DOCKET

(1)

No. 86-6757-ASY
Status: GRANTED

Title: John Avery Coy, Appellant
v.
Iowa

Docketed:
April 15, 1987

Court: Supreme Court of Iowa

Counsel for appellant: Papak,Paul J.

Counsel for appellee: Allen,Gordon E.

Entry	Date	Note	Proceedings and Orders
17	Mar 6 1987		Application for an extension of time to docket an appeal filed (A-657), and order granting same until April
18	Mar 6 1987		16, 1987 by Blackmun, J., on March 7, 1987.
1	Apr 15 1987	G	Statement as to jurisdiction and motion for leave to proceed in forma pauperis filed.
3	May 18 1987		Motion of appellee Iowa to dismiss filed.
4	May 20 1987		DISTRIBUTED. June 4, 1987
5	May 28 1987	X	Reply brief of appellant John A. Coy filed.
6	Jun 19 1987		REDISTRIBUTED. June 25, 1987
8	Jun 26 1987		PROBABLE JURISDICTION NOTED.
			**********
9	Jul 6 1987	G	Motion of appellant for appointment of counsel filed.
11	Jul 14 1987		DISTRIBUTED. Sept. 28, 1987 (Motion for appointment of counsel).
10	Jul 15 1987		REDISTRIBUTED. September 28, 1987
13	Jul 27 1987		Order extending time to file brief of appellant on the merits until August 24, 1987.
14	Aug 3 1987	G	Motion of appellant to seal the record filed.
15	Aug 10 1987		Joint appendix filed.
16	Aug 12 1987		DISTRIBUTED. Sept. 28, 1987. (Motion of appellant to seal the record).
19	Aug 17 1987		Order further extending time to file brief of appellant on the merits until September 7, 1987.
20	Sep 4 1987		Brief amicus curiae of American Bar Assn. filed.
21	Sep 8 1987		Brief amicus curiae of Natl. Assn. of Criminal Defense Lawyers filed.
22	Sep 8 1987		Brief of appellant John A. Coy filed.
24	Sep 26 1987		Order extending time to file brief of appellee on the merits until November 9, 1987.
25	Oct 5 1987		Motion of appellant to seal the record GRANTED.
26	Oct 5 1987		Motion for appointment of counsel GRANTED and it is ordered that Paul J. Papak, Esquire, of Iowa City, Iowa, is appointed to serve as counsel for the appellant in this case.
27	Oct 26 1987		Order further extending time to file brief of appellee on the merits until November 23, 1987.
32	Nov 15 1987		Brief amicus curiae of Judge Charles B. Schudson filed.
28	Nov 17 1987		Brief amici curiae of Connecticut, et al. filed.
30	Nov 19 1987		Brief amici curiae of Kentucky, et al. filed.
29	Nov 23 1987		Brief of appellee Iowa filed.
31	Nov 23 1987		SET FOR ARGUMENT. Wednesday, January 13, 1988. (3rd

No. 86-6757-ASY

Entry	Date	Note	Proceedings and Orders
			case).
33	Dec 5 1987		CIRCULATED.
34	Dec 23 1987	X	Reply brief of appellant John A. Coy filed.
35	Jan 13 1988		ARGUED.

JURISDICTIONAL STATEMENT

Apr. 15, 1987

No. 86-6757

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JOHN AVERY COY,

Appellant,

v.

STATE OF IOWA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF IOWA

JURISDICTIONAL STATEMENT

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April 16, 1987

QUESTIONS PRESENTED

Whether Iowa Code § 910A.3, when applied to permit a one-way screening barrier to be placed between a criminal defendant and complaining witnesses, without establishing an essential state interest, while those witnesses are testifying in open court, violates the right to a fair trial under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

Whether Iowa Code § 910A.3, when applied to permit a one-way screening barrier to be placed between a criminal defendant and complaining witnesses, without establishing an essential state interest, while those witnesses are testifying in open court, violates the Confrontation Clause of the Sixth Amendment of the Constitution of the United States.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JOHN AVERY COY,

Appellant,

v.

STATE OF IOWA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF IOWA

JURISDICTIONAL STATEMENT

Appellant, John Avery Coy, appeals from the final judgment of the Supreme Court of Iowa, dated December 17, 1986, holding that Iowa Code section 910A.3, as applied in this case, is not unconstitutional as being violative of appellant's right to a fair trial guaranteed by the Fourteenth Amendment of the Constitution of the United States and to confront witnesses against him guaranteed by the Sixth Amendment of the Constitution of the United States.

OPINION BELOW

The opinion of the Supreme Court of Iowa, which appears in the appendix hereto, p. 1a, *infra*, is reported at 397 N.W.2d 730 (Iowa 1986).

JURISDICTION

The judgment of the Supreme Court of Iowa, affirming appellant's conviction, was entered on December 17, 1986 (App., *infra*, 1a). A Motion for Rehearing was filed and denied on January 16, 1987 (App., *infra*, 12a).

A Notice of Appeal to this Court was timely filed in the Supreme Court of Iowa on March 6, 1987 (App., *infra*, 13a).

This appeal is being docketed in this Court within 90 days from the denial of rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTE

Fourteenth Amendment, United States Constitution:

> No state shall * * * deprive any person of life, liberty, or property, without due process of law * * *.

Sixth Amendment, United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *.

Iowa Code § 910A.3:

> 1. A court may, upon its own motion or upon motion of any party, order that the testimony of a child, as defined in section 702.5, be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court. Only the judge, parties, counsel, persons necessary to operate the equipment, and any person whose presence, in the opinion of the court, would contribute to the welfare and well-being of the child may be present in the room with the child during the child's testimony.
>
> The court may require a party be confined to an adjacent room or behind a screen or mirror that permits the party to see and hear the child during the child's testimony, but does not allow the child to see or hear the party. However, if a party is so confined, the court shall take measures to insure that the party and counsel can confer during the testimony and shall inform the child that the party can see and hear the child during testimony.
>
> 2. The court may upon motion of a party order that the testimony of a child, as defined in section 702.5, be taken by recorded deposition for use at trial, pursuant to rule of criminal procedure 12(2)(b).
>
> 3. The court may upon motion of a party admit into evidence the recorded statements of a child, as defined in section 702.5, describing sexual contact performed with or on the child, not otherwise admissible in evidence by statute or court rule if the court determines that the recorded statements substantially comport with the requirements for admission under Iowa rules of evidence 803(24) or 804(5).

HOW THE FEDERAL QUESTION WAS RAISED

Seven days prior to jury trial on the charge of two counts of lascivious acts with a child, the appellee requested that the appellant be confined behind a screen or mirror during the testimony of the complaining witnesses, pursuant to Iowa Code § 910A.3. The appellant resisted, arguing that implementation of § 910 A.3 "violates defendant's rights to due process of the law under the Fourteenth Amendment to the United States Constitution and under the Sixth Amendment to the United States Constitution to confront witnesses against him." Prior to trial, appellant reiterated his argument that the screening device permitted by § 910A.3 was repugnant to the Due Process Clause of the Fourteenth Amendment and the Confrontation Clause of the Sixth Amendment. Appellant restated that position immediately prior to the testimony of the first child witness.

On appeal to the Iowa Supreme Court, appellant again asserted the Fourteenth and Sixth Amendment claims (App., *infra*, *1a*). The Iowa Supreme Court concluded that appellant's contention that the screening device authorized by § 910A.3 denied him his right to a fair trial under the Fourteenth Amendment to the United States Constitution was without merit (App., *infra*, 11a). As to the Sixth Amendment claim, the Iowa Supreme Court concluded that appellant's "right of confrontation was not infringed" (App., *infra*, 9a). It thus considered and expressly rejected appellant's federal constitutional claims.

STATEMENT OF THE CASE

In the early morning hours of August 3, 1985, two thirteen year old girls were sexually molested by a man who entered the makeshift tent where they had been sleeping. The tent was located in the backyard of the home where one of the girls lived and next door to the house where appellant, John Avery Coy,

resided. Neither girl was ever able to identify appellant as her assailant.

On August 14, 1985, appellant was charged with two counts of lascivious acts with a child. Seven days prior to trial, on November 6, 1985, the appellee applied, pursuant to Iowa Code § 910A.3, to have the testimony of the two girls taken in a room other than the courtroom and televised by closed circuit television into the courtroom. Appellee further requested that appellant be confined behind a screen or mirror that would permit the appellant to see and hear the witnesses during their testimony but would not allow the girls to see the appellant.

Appellant resisted the motion and argued that application of Iowa Code § 910A.3 would violate his constitutional rights to a fair trial under the Due Process Clause of the Fourteenth Amendment and to confront the witnesses against him under the Sixth Amendment. The trial court overruled appellant's objections and, on its own motion, ordered that a one-way screening structure be erected *in the courtroom* and be in place during the testimony of the two witnesses.

At trial by jury the court noted that appellee had "set up a large screen" and that it is "a frame with a substance on it which makes it possible for the defendant to see the witness but the witness does not see the defendant." (App., *infra*, 15a). The court tested the device and indicated that "[t]he thing does cause sort of a dramatic emphasis, but we'll have to instruct on it if we grant the motion." For the screening device to function properly in the courtroom, the ceiling lights had to be turned off and a panel of bright lights had to be focused directly on the structure.

At trial, neither witness was able to identify the appellant as her assailant, and the State admitted that a positive identification of appellant was never made pre-trial. No

evidence was offered that the witnesses were traumatized by the prospect of testifying before the appellant or in open court, or that a screening barrier was, for some other reason, a necessity. In granting the appellee's request under § 910A.3, the court made no finding, specific to that trial, of an essential state interest served by placing the screening device between the appellant and the witnesses.

Appellant, on November 19, 1985, was found guilty of two counts of engaging in lascivious acts with a child. On appeal to the Iowa Supreme Court, appellant noted:

> Coy's appeal provides this Court with its first opportunity to review the constitutionality of § 910A.3, which took effect July 1, 1985. Coy argues that the use of a screen to prevent witnesses from viewing him at trial deprives him of the ability to confront witnesses, and, because it creates an 'indicia of guilt' denies due process.

The Iowa Supreme Court, affirming appellant's conviction, held that "use of the screen was not inherently prejudicial in the circumstances of this trial" and, absent a showing of actual prejudice, the contention that use of the screen denied appellant his right to a fair trial was without merit (App., *infra*, 11a). The court further concluded that appellant's "right of confrontation was not infringed" (App., *infra*, 9a).

THE QUESTION IS SUBSTANTIAL

I.

The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment to the United States Constitution. *Drope v. Missouri*, 420 U.S. 162, 172 (1975). The presumption of innocence, although not expressly articulated in the Constitution, was long ago recognized by this Court as a basic component of a fair trial under our system of justice. *Coffin v. United States*, 156 U.S. 432, 453-60 (1895). To implement and protect this presumption, courts must carefully guard against

dilution of the principle that guilt or innocence is to be determined solely on the basis of probative evidence introduced at trial and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial. *See Taylor v. Kentucky*, 436 U.S. 478 (1978); *In re Winship*, 397 U.S. 358 (1970).

This case presents the issue of whether a state statute violates a criminal defendant's right to a fair trial under the Due Process Clause of the Fourteenth Amendment when applied to permit a one-way screening barrier to be erected between that defendant and complaining witnesses, in the absence of any demonstration of an essential state interest, while those witnesses are testifying in open court.[1]

The Fourteenth Amendment does not mandate that "every practice tending to single out the accused from everyone else in the courtroom must be struck down." *Holbrook v. Flynn*, 106 S. Ct. 1340, 1345 (1986).

> Whenever a courtroom arrangement is challenged as inherently prejudicial . . . the question must be . . . whether 'an unacceptable risk is presented of impermissible factors coming into play.' (Citation omitted).

Id. at 1347. Certain practices, however, "pose such a threat to the 'fairness of the fact-finding process' that they must be subjected to 'close judicial scrutiny'". *Id.* at 1345, *citing Estelle v. Williams*, 425 U.S. 501, 503-504 (1976).

In *Estelle v. Williams*, this Court struck down the practice of forcing a criminal defendant to wear prison clothing when appearing before the jury, noting that "the constant reminder of

1. Iowa Code section 910A.3 does not, on its face, clearly contemplate the erection of an *in-court* barrier between defendants and victims of child abuse, during the testimony of those victims. However, the Iowa Supreme Court construed the statute as permitting use of such a structure in court and for purposes of this appeal, this Court must accept the state court's construction and proceed to test its validity on that basis. *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684, 688 (1959); *Guaranty Trust Co. v. Blodgett*, 287 U.S. 509, 513 (1933).

the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment." *Id.* at 504-505.[2] Similarly, courts have consistently recognized that a criminal defendant has the right to appear before the jury free from shackles or other physical restraints, because such practices may effect the presumption of innocence by marking the defendant as dangerous or suggesting that his guilt is a foregone conclusion.[3] But in *Holbrook v. Flynn*, this Court, while recognizing "the threat that a roomful of uniformed and armed policemen might pose to defendant's chances of receiving a fair trial", *Id.* at 1347, nonetheless concluded that the use of four troopers for extra courtroom security did not brand the defendant "'with an unmistakable mark of guilt.'" *Id. citing, Williams*, 425 U.S. at 518 (BRENNAN, J., dissenting).

In distinguishing the use of four troopers in *Flynn* from prison garb in *Williams* and other courtroom practices that might be deemed inherently prejudicial, this Court pointed to the "wider range of inferences that a juror might reasonably draw from the officers' presence." *Flynn*, 106 S.Ct. at 1346.

> While shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large, the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable.

Id.

What more clearly signals the jury to a need to separate a criminal defendant from the community at large than an imposing, frame structure, emphasized by special lighting, placed between the defendant and the complaining witnesses during the testimony

2. *See also United States v. Harris*, 703 F.2d 508 (11th Cir. 1983); *Gaito v. Brierley*, 485 F.2d 86 (3rd Cir. 1973).

3. *Harrell v. Israel*, 672 F.2d 632 (7th Cir. 1982); *Kennedy v. Cardwell*, 487 F.2d 101 (6th Cir. 1973); *see also Young v. Callahan*, 700 F.2d 32 (1st Cir. 1983) (confinement in the courtroom, like prison garb, can erode the presumption of innocence).

of those witnesses in open court? While the Iowa Supreme Court concluded that the structure was not inherently prejudicial because the jury "likely concluded the screen was being used to reduce the trauma necessarily attendant to the children's testimony", (App., *infra*, 11a), the court ignored the inescapable inference that the appellant was the cause of that trauma and thus guilty. Blocking the view of the appellant does not reduce the trauma of testifying in open court except to the extent that it reduces trauma associated with testifying in the presence of appellant. Inevitably, the jury is led to infer that testifying in the presence of appellant, without physical separation by the screening barrier, would exacerbate psychological injury to the witnesses *because the appellant is guilty as charged*.

Iowa Code § 910A.3, to the extent it permits the erection of an in-court, one-way barrier between a criminal defendant and complaining witnesses, erodes the presumption of innocence and poses such a threat to the fairness of the fact-finding process that it must be subjected to the "close judicial scrutiny" mandated by *Estelle v. Williams*.[4/]

The erection of an in-court, one-way barrier between a criminal defendant and complaining witnesses is the sort of inherently prejudicial practice, like shackling, that should only be permitted where justified by an essential state interest

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4. In *Holbrook v. Flynn*, this Court pointed out that close scrutiny of inherently prejudicial practices is not, however, inevitably fatal. *Flynn*, 106 S.Ct. at 1345. In *Illinois v. Allen*, 397 U.S. 337 (1970), this Court observed that in certain extreme situations, subjecting a criminal defendant to an inherently prejudicial practice might be the fairest and most reasonable way to handle him. *Id.* at 344. In *Allen*, The Court found that defendant's repeated disrupted behavior and use of vile and abusive language directed at the trial judge necessitated extreme measures. No such extreme circumstances appear in the instant case.

specific to each trial. *Flynn*, 106 S.Ct. at 1346.[5/] No essential state interest or extreme need was advanced by appellee or determined by the trial court, and neither may be inferred from the record. There was no showing that the witnesses were traumatized by the prospect of testifying in open court or in the presence of the appellant. Nor can such trauma be inferred from the nature of the charge.[6/] In *Hochheiser v. Superior Court*, 161 Cal. App.3d 777, 208 Cal. Rptr. 273 (1984), the California Court of Appeal refused to allow the presentation of testimony by way of closed circuit television in a molestation trial. The court said that even if technological innovations could be used in some cases, a generalized belief in psychological trauma was insufficient to establish need in a particular case. *Id.* at 792-93, 208 Cal. Rptr. at 283. *Citing Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), the court indicated that before a trial judge authorizes the use of a technological innovation to protect a minor witness, the prosecution must present a factual basis supporting the nature of the potential injury to the witness, its degree, and its potential duration. *Hochheiser*, 161 Cal. App.3d at 793, 208 Cal. Rptr. at 283.

Absent a requirement of demonstrating an essential state interest, and to the extent it permits the placement of an in-court barrier between criminal defendants and complaining witnesses, Iowa Code § 910A.3 is constitutionally infirm.

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5. A showing of "extreme need" is required to justify the use of physical restraints at trial, *United States v. Garcia*, 625 F.2d 162 (7th Cir. 1980), and this showing should be made on the record after a hearing. *Id.; United States v. Esquer*, 459 F.2d 431 (7th Cir. 1972).

6. "There is no reliable evidence to conclude that children in general cannot testify effectively in court or that they are universally traumatized by the experience. In fact the opposite seems to be true. * * * Counselors have found that children sometimes psychologically benefit by participating in the criminal justice system." Berliner, *The Child Witness: The Progress and Emerging Limitations*, 40 U of Miami L.Rev. 167, 174-75 (1985).

II.

The right of the accused to be confronted with the witnesses against him, embodied in the Sixth Amendment, is "an essential and fundamental requirement for . . . fair trial" which is binding on the states, as are the standards for confrontation developed in the federal courts. *Pointer v. Texas*, 380 U.S. 400, 405-406 (1965). In *United States v. Benfield*, 593 F.2d 815 (8th Cir. 1979), the Eighth Circuit Court of Appeals addressed the issue of whether a face-to-face meeting is part of the confrontation right guaranteed by the Sixth Amendment. Tracing the historical development of Sixth Amendment jurisprudence, and relying on *Mattox v. United States*, 156 U.S. 237 (1895), *Kirby v. United States*, 174 U.S. 47 (1899), *Dowdell v. United States*, 221 U.S. 325 (1911), and *Snyder v. Massachussetts*, 291 U.S. 97 (1934), the court concluded that the defendant's rights were abridged by the admission of a videotaped deposition of a kidnapping victim.

> After carefully considering the sixth amendment, applicable case law, and this record, we are satisfied that the rights of Benfield were abridged by the above procedure. Normally the right of confrontation includes a face-to-face meeting at trial at which time cross-examiantion takes place. *Mattox, Kirby, Dowdell* and *Snyder*, . . . all support that view. While some recent cases use other language, none denies that confrontation required a face-to-face meeting in 1791 and none lessens the force of the sixth amendment. Of course, confrontation requires cross-examination in addition to a face-to-face meeting. . . . The right of cross-examination reinforces the importance of physical confrontation. Most believe that in some undefined but real way recollection, veracity, and communication are influenced by face-to-face challenge. This feature is a part of the sixth amendment right additional to the right of cold, logical cross-examination by one's counsel. While a deposition necessarily eliminates a face-to-face meeting between witness and jury, we find no justification for further abridgment of the defendant's rights. A videotaped deposition supplies an environment substantially comparable to a trial, but where the defendant was not permitted to be an active participant in the video deposition, this procedural substitute is constitutionally infirm.

Benfield, 593 F.2d at 821. *See also Hochheiser v. Superior Court*, 161 Cal. App. 3d 777, 208 Cal. Rptr. 273 (1984); *Herbert*

v. Superior Court, 117 Cal. App. 3d 661, 172 Cal. Rptr. 850 (1981).

The adversarial nature of our criminal justice system, as reflected in the Confrontation Clause, rests upon the assumption that a face-to-face challenge influences recollection, veracity, and communication, and that observing this confrontation will assist the trier of fact in determining credibility. *See Benfield*, 593 F.2d at 821; *Hochheiser*, 161 Cal. App. 3d at 777, 208 Cal. Rptr. at 273. While in recent years this Court has decided many cases involving questions of the admissibility of hearsay statements of *unavailable* declarants, each such case has premised its discussion upon the principle that the Confrontation Clause requires *available* complaining witnesses to be called at trial before the jury, for examination by the prosecution in the presence of the accused, and for cross-examination by the accused.[7] *See Ohio v. Roberts*, 448 U.S. 56 (1980).

In *Herbert*, a California Court of Appeal ruled that face-to-face confrontation was absolutely essential. It was a denial of the defendant's rights, under the Sixth Amendment, when he was moved to a remote part of the courtroom where he could hear but not see the five-year-old child when she was testifying against him. *Herbert v. Superior Court*, 117 Cal. App.3d 661, 172 Cal. Rptr. 850 (1981). The court explained the significance it attached to face-to-face confrontation:

> By allowing the child to testify against the defendant without having to look at him or be looked at by him, the trial court not only denied defendant the right of confrontation but also foreclosed an effective method of determining veracity.

Id. at 668, 172 Cal. Rptr. at 853. The court further stated:

> The historical concept of the right of confrontation has included the right to see one's accusers face-to-face thereby giving the fact finder the opportunity of weighing

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7. *Cf. United States v. Inadi*, 106 S.Ct. 1121, 1125-29 (1986).

> the demeanor of the accuser when forced to make his or her accusation before the one person who knows if the witness is truthful. A witness's reluctance to face the accused may be the product of fabrication rather than fear or embarrassment.

Id. at 671, 172 Cal. Rptr. at 855.

While the witnesses in the instant case testified under oath before the jury and were cross-examined by appellant's counsel, the trial court needlessly impeded a face-to-face challenge with appellant. No showing was made that the witnesses were "unavailable" to testify in appellant's presence or that some essential state interest was served by the infringement of confrontation rights. In short, to the extent that Iowa Code § 910A.3 denied appellant face-to-face confrontation with witnesses who were not "unavailable" to testify in his presence at trial, the statute is violative of the Sixth Amendment.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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MOTION

ORIGINAL

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IN THE SUPREME COURT OF THE UNITED STATES
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JOHN AVERY COY,

Appellant,

v.

STATE OF IOWA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF IOWA

MOTION OF APPELLEE TO DISMISS

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May 14, 1987

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MOTION TO DISMISS

Appellee in the above-entitled case moves to dismiss or affirm on the grounds that the appeal does not present a federal question which was expressly passed on and that the question presented is so unsubstantial as not to need further argument.

STATE STATUTE INVOLVED

This appeal raises the question of the validity of Iowa Code section 910A.3(1) (1985), which provides:

> 1. A court may, upon its own motion or upon motion of any party, order that the testimony of a child, as defined in section 702.5, be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court. Only the judge, parties, counsel, persons necessary to operate the equipment, and any person whose presence, in the opinion of the court, would contribute to the welfare and well-being of the child may be present in the room with the child during the child's testimony.
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> The court may require a party be confined to an adjacent room or behind a screen or mirror that permits the party to see and hear the child during the child's testimony, but does not allow the child to see or hear the party. However, if a party is so confined, the court shall take measures to insure that the party and counsel can confer during the testimony and shall inform the child that the party can see and hear the child during testimony.

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MOTION TO DISMISS

STATEMENT OF FACTS

Two 13-year-old girls made a make-shift tent in the backyard in a suburban neighborhood. They were awakened by a man in the middle of the night, who grabbed them by the throats and told them not to scream. He said he expected to find only one girl. The assailant used a flashlight he found in the tent to shine a light in the victims' eyes so that they could not identify him. He also wore make-up or a mask to hide his identity. The girls could see that he had a watch pushed midway up his arm, with the face of the watch directed toward the assailant's body.

The assailant ordered the girls to disrobe. He then fondled the girls, forced them to perform an oral sex act on him and forced the two girls "to kiss each other and pretend that they were enjoying it." He directed the girls to urinate in his face, but they refused. After about 90 minutes, the assailant tied the girls' hands, told them he would return, and then disappeared.

One victim's father suspected that the assailant was John Coy, a neighbor whom the father had seen earlier. The father had noted that John Coy, who seldom sat in the back yard, had been watching the victim set up the make-shift tent in the back yard.

The father told police of his suspicions and the police discovered that Coy had an outstanding arrest warrant. When he was arrested, he was wearing a watch pushed midway up his arm, with the face of the watch directed toward his body.

ARGUMENT

The Federal Question Sought to be Reviewed Was Not Expressly Raised

Appellant argues that the constitutionality of section 910A.3 has been properly presented to and decided by the Iowa Supreme Court. This is a necessary prerequisite to appeal. See Garrity v. New Jersey, 385 U.S. 493, 495-96 (1967).

At the trial court level, appellant argued that use of a screen between appellant and the victims would deny him his rights to confrontation and due process. He did not, however, directly challenge the constitutionality of the statute. The constitutional challenge to the statute was expressly raised by the appellant in his direct appeal to the Iowa Supreme Court, but it is unclear from the Court's decision whether the ruling was based on a challenge to the statute itself or on the trial-level challenge to the procedure used.

Use of a screen in Iowa trials predated section 910A.3. See State v. Strable, 313 N.W.2d 497 (Iowa 1981). Thus, the challenge in this case could have been to the procedure itself rather than to the statute authorizing the procedure.

The opinion by the Iowa Supreme Court focuses on the procedure rather than on the statute. The statute therefore has not been adequately "drawn in question," and does not present a substantial federal question. See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 476 (1975).

The Case Presents No Substantial Federal Question
Not Previously Decided By This Court

1. Due Process

Appellant contends that the use of a mirrored screen is so inherently prejudicial that its use violates his right to due process. This Court has generally disapproved the use of "inherently prejudicial" practices, such as requiring an accused to wear prison clothing or requiring an accused to be bound and gagged during trial. See Estelle v. Williams, 425 U.S. 501, 503-04 (1976); Illinois v. Allen, 397 U.S. 337 (1970).

In Holbrook v. Flynn, 106 S. Ct. 1340, 1346 (1986), this Court examined the features of a challenged practice to decide whether it should be deemed "inherently prejudicial." The Court focused on "the wider range of inferences that a juror might reasonably draw" from the challenged practice. Id. If jurors may draw harmless inferences or no inferences at all, the practice is not deemed "inherently prejudicial." Id. at 1346-47. The Court adopted a case-by-case approach, id. at 1346, and held that it is a defendant's burden to show prejudice. Id. at 1348.

In the case at bar, the jury reasonably could have and probably did, draw nonprejudicial inferences from the use of the screen. First, the screen was used only during the testimony of the two young victims. Its use was thus quite limited.

Second, the trial court's instruction to the jury minimized any possible prejudice and discouraged any unfavorable inferences by the jury. The trial court told the jurors:

> It's quite obvious to the jury that there's a screen device in the courtroom. The General Assembly of Iowa recently passed a law which provides for this sort of a procedure in cases involving children. Now, I would caution you now and I will caution you later that you are to draw no inference of any kind from the presence of that screen. You know, in the plainest language, that is not evidence of the defendant's guilt, and it shouldn't be in your mind as an inference as to any guilt on his part. It's very important that you do that intellectual thing.

The use of a screening device is not in itself an indication of guilt. It does not "separate a defendant from the community at large" nor must it be interpreted "as a sign that he is particularly dangerous or culpable." It is as much a reflection on the witness as it is on the defendant.

Appellant has cited no case in which any court has found the use of a screen device to be inherently prejudicial. Because of the wide range of inferences the jurors may draw from its use, a screen device is not inherently prejudicial.

2. Confrontation

Appellant argues that the use of a one-way, mirrored screen during a child's testimony violates his sixth amendment right to confront witnesses and that the prosecution is required to show the necessity of use of the screen, apparently because of the "unavailability" of the witnesses.

At trial, appellant did not specifically allege that a showing of necessity or unavailability was required to protect his confrontation right. Nonetheless the Iowa Supreme Court held that the trial court "had no obligation to make an independent finding of necessity." State v. Coy, 397 N.W.2d 730 (Iowa 1986).

On the question of confrontation rights, this Court has long said that "[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." Davis v. Alaska, 415 U.S. 308, 315 (1974), quoted in Delaware v. Van Arsdall, 106 S. Ct. 1431, 1435 (1986). A showing of unavailability or "necessity" is not constitutionally required in every case. United States v. Inadi, 106 S. Ct. 1121, 1125 (1986).

Moreover, the purposes of the confrontation clause have been served in the specific facts presented in the case at bar. Most importantly, the defendant was given an unlimited right to cross-examine the victims, so the essential purpose of the

confrontation clause was served. See California v. Green, 399 U.S. 149, 158 (1970). In addition, the witnesses appeared in the courtroom, in full view of the jury; they gave their testimony under oath; Appellant could see the witnesses from his vantage point; defense counsel could sit anywhere in the courtroom; and the witnesses were aware that appellant was sitting behind the screen. There was no violation of any recognized constitutional right to confrontation.

CONCLUSION

Wherefore, appellee respectfully submits that the question upon which this case depends was not timely raised and is so unsubstantial as not to need further argument. The State of Iowa respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in the cause by the Iowa Supreme Court.

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GORDON E. ALLEN
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Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certify that on the 15th day of May, 1987, three copies of the foregoing document were deposited in a United States Post Office mailbox, with postage prepaid, and addressed to counsel for the petitioner:

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The undersigned further certify that all parties required to be served have been served.

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REPLY BRIEF

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Supreme Court, U.S.
FILED
MAY 28 1987
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NO. 86-6757

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JOHN AVERY COY,

Appellant,

vs.

STATE OF IOWA,

Appellee.

APPELLANT'S REPLY TO MOTION TO DISMISS

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May 28, 1987

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ARGUMENT

II. THE FEDERAL QUESTION WAS EXPRESSLY RAISED

An appeal will lie, for purposes of 28 U.S.C. Sec. 1257(2), where the validity of a state statute is "drawn in question," as being repugnant to the federal constitution, treaties or laws, and the state court's decision is in favor of the statute's validity. Appellee concedes (Motion of Appellee to Dismiss, p. 2) that the validity of Iowa Code Sec. 910A.3(1) was "drawn in question" by direct appeal to the Iowa Supreme Court.

> Coy's appeal provides this Court with its first opportunity to review the constitutionality of Sec. 910A.3, which took effect July 1, 1985.

Appellant's Brief and Argument and Request for Oral Argument, Iowa Supreme Court No. 85-1842, p. 8.

At the trial court level, the district court judge clearly understood appellant's challenge to be directed at the constitutionality of Sec. 910A.3.

> I will rule. *** The statute is presumed to be constitutional. Putting it in the context of what we actually have here and the statute, I rule that the situation as proffered is not violative of the right to confrontation.

Trial Transcript, pp. 21-22. Appellee suggests that since there is common law authority for use of a screening device in Iowa, appellant's challenge could have been to the procedure itself rather than to the statute authorizing the procedure. This argument overlooks the explicitness of the State's application to use a screening device:

> This Application is made pursuant to Section 6 of House File 462 of the Laws of the Seventy First General Assembly of the State of Iowa.[1]

Appendix, Supreme Court of Iowa No. 85-1842, p. 35. Application to employ a screening device and constitutional challenges at the trial court and appellate level were directed at Iowa Code Sec. 910A.3.

In Bryant v. Zimmerman, 278 U.S. 63, 67 (1928), this Court said:

---

1. 85 Acts, Ch. 174, Sec. 6 HF 462 was codified at Iowa Code Sec. 910A.3. It was transferred by 86 Acts, Ch. 1178, Sec. 19 to Iowa Code Sec. 910A.14.

> There are various ways in which the validity of a state statute may be drawn in question on the ground that it's repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.

In ruling on the validity of the state statute, the Iowa Supreme Court stated:

> Because we conclude the express requirements of section 910A.3(1) fully protect Coy's confrontation right, we hold trial court had no obligation to make an independent finding of necessity.

State v. Coy, 397 N.W.2d 730, 733 (Iowa 1986). Thus, the state court expressly upheld the validity of the state statute as against federal, constitutional challenge. Even if the precise basis of the state court opinion is blurred, as appellee suggests, the failure to expressly pass on federal constitutional objections to a state statute is treated as equivalent to a finding of validity within the meaning of Sec. 1257(2), such that an appeal will lie. Lawrence v. State Tax Commission, 286 U.S. 276, 282-83 (1932).

Finally, even if this Court agrees that the state statute has not been adequately "drawn in question," appellant requests, pursuant to 28 U.S.C. Sec. 2103, that the Jurisdictional Statement filed herein be regarded and acted upon as a petition for writ of certiorari.

II. THE QUESTION IS SUBSTANTIAL

Appellee contends that the screening device authorized by Iowa Code Sec. 910A.3 is not inherently prejudicial because of the wide range of inferences the jurors may draw from its use. The inescapable inference drawn from such a screening device, however, is that the defendant's presence in court further traumatizes the victim witnesses because he is guilty. Where, as in this case, the statute authorizes the erection of a physical barrier, without any showing of necessity, the statute cannot pass constitutional muster. Nor is the constitutional infirmity overcome by a

cautionary instruction. As the Iowa Supreme Court correctly noted, "Because inherently prejudicial practices may influence a jury subconsciously, a court cannot always assume cautionary instructions will be sufficient to prevent prejudice." Coy, 397 N.W.2d at 735.

CONCLUSION

For these reasons, and for those stated in the Jurisdictional Statement filed herein, this Court should overrule Appellee's Motion to Dismiss and note probable jurisdiction of this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 28th day of May, 1987, two copies of the Appellant's Reply to Motion to Dismiss were deposited in a U.S. Post Office Box, with postage prepaid, and addressed to counsel for appellee:

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May 28, 1987

JOINT APPENDIX

Supreme Court, U.S.
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CLERK

No. 86-6757

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOHN AVERY COY,

Appellant,

v.

STATE OF IOWA,

Appellee.

On Appeal from the Supreme Court of Iowa

JOINT APPENDIX

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PROBABLE JURISDICTION NOTED JUNE 26, 1987

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

August 14, 1985	—	Trial Information Filed
November 6, 1985	—	Application for Use of Screening Device
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March 31, 1987	—	Stipulation re Correction or Modification of the Record

IN THE IOWA DISTRICT COURT
FOR CLINTON COUNTY

K-6962

STATE OF IOWA,
Plaintiff

vs

JOHN AVERY COY,
Defendant

APPLICATION

Filed Nov. 6, 1985

COMES NOW the Plaintiff and states:

(1) This Application is made pursuant to Section 6 of House File 462 of the Laws of the Seventy First General Assembly of the State of Iowa.

(2) Trial by jury is scheduled for November 13, 1985, commencing at 9:00 o'clock a.m. The Defendant is charged with two counts of Lascivious Acts With A Child.

(3) The Plaintiff moves this Honorable Court that the testimony of the two child witnesses be taken in a room other than the Courtroom and be televised by closed circuit equipment in the Courtroom to be viewed by the Court.

(4) Plaintiff further requests that the Defendant be confined behind a screen or mirror that permits the Defendant to see and hear the children during their testimony but does not allow the children to see or hear the Defendant.

(5) Plaintiff is prepared and has under construction mirrored glass which would permit the Defendant to con-

fer with his counsel during the testimony of the children and which would permit the Defendant to see and hear the children during their testimony, but would not allow the children to see or hear the Defendant.

WHEREFORE, Plaintiff respectfully moves the Court for hearing upon this Application and that upon such hearing this Application be granted.

/s/ Gary J. Rolfes
GARY J. ROLFES
Assistant County Attorney
P.O. Box 157
Clinton, Iowa 52732

IN THE IOWA DISTRICT COURT
FOR CLINTON COUNTY

(Title Omitted in Printing)

TRANSCRIPT OF PROCEEDINGS

Whereupon, pursuant to assignment, the above-entitled matter came on for hearing before the court, commencing at 9 a.m., on November 7, 1985 at the Clinton County Courthouse, Clinton, Iowa, before the Hon. L. D. Carstensen, judge.

• • • •

[3] (Whereupon, the following proceedings were had in open court, commencing at 9 a.m., on November 7, 1985.)

THE COURT: The State of Iowa versus John Avery Coy, K-6962. Mr. Rolfes is here; Mr. Wolfe is here; the defendant is here.

What's before me, please?

MR. ROLFES: There's an application by the State, your Honor, pursuant to the Victim and Witness Protection Act, being House File 462 of the Laws of the 71 General Assembly of the State of Iowa, effective July 1, 1985. This application is brought pursuant to Section 6 of that Act wherein a party may move the court to have the testimony of a child witness taken in a room other than the courtroom and be televised by closed-circuit equipment in the courtroom to be viewed by the court. The State is prepared to have a screen available wherein the defendant would be able at all times to see the children, to confer with his attorney but, at the same time, the children would not be able to see the defendant. In addition, if the court would allow the closed-circuit equipment to be used, that could be available.

THE COURT: Mr. Wolfe.

MR. WOLFE: Your Honor, I knew the State was preparing the motion yesterday, and Mr. Rolfes discussed the matter with me. I don't have a copy of the actual [4] written motion. However, I understand what the thrust of it is.

THE COURT: Hand him a copy of your application.

MR. WOLFE: We would resist the action as requested by the State on a number of different grounds, certainly one of them being the Sixth Amendment right, confrontation of witnesses. We would also resist it from the practical standpoint that it's my understanding that what's being proposed by the State is that the jurors would be seated in the jury box, the witnesses would be in chambers; the judge would be present; the court reporter would be present; I would be present; the State would be present. I gather it's being suggested that the defendant would be somehow or another screened off. It would seem to me that the primary separation is going to be between the jurors and the witness, and I think it's extremely important that the jurors have an opportunity to view the witnesses. I would certainly—

THE COURT: Mr. Wolfe, I'm afraid you've got a little wrong notion about the practicality of it. If the court granted the order, what would occur—and for purposes of a written record I'll describe the—that before the bench are two counsel tables with two chairs at each, and that the entrance to the inner court here is [5] to the north and the jury box is to the south, and that the chairs at counsel table, counting from the north to the south, are, at the first table, Chairs No. 1 and No. 2, and at the second table, Chairs No. 3 and No. 4, and that the defendant would be seated in Chair No. 1 and his counsel in Chair No. 2 or wherever else counsel felt it necessary to perform his function. The State would sit at Chair No. 2. Immediately to the south of the bench is a raised dais, which has been used for various reasons in this court, but which during this trial will be used as a wit-

ness box. However—and that dais is two steps—almost two feet raised from the floor. To the south of that witness box is a wooden rail, and to the south of the wooden rail will be placed a chair, and the chair will be well back. The child witness will sit on that. The child will be in good view of the court and in good view of the jury. At an angle from the bench in the direction of the jury box to the southwest would be a screen, and that that screen would be made of a material that would make it possible for the defendant to view the child—and counsel would have the right to view the child from anyplace he wished—and the child would not be able to see the defendant. The child would enter the courtroom through a door very close to the chair.

I don't know if that's what's proposed. [6] If I grant the order, that's what I assume will happen.

MR. WOLFE: Okay. It was my misunderstanding, I guess.

THE COURT: That's all right, Mr. Wolfe. I don't know if it's a misunderstanding. I don't imagine that—

MR. WOLFE: Okay.

THE COURT: Well, we came here to take a look at it. I took a look at the thing yesterday to see whether it would be practical.

You assumed from the statute that there was going to be a television hookup, and so forth?

MR. WOLFE: That was the way it was explained to me as the State's proposal.

THE COURT: Which is fine. And I have no quarrel with statutes. That's very dramatic. That's very unnatural. That puts strange untested emphasis, which—it's an untested thing that we don't know a lot about. The screen adds something to a courtroom that we're not used to, also, but it seems the more moderate and least obtrusive approach.

• • • •

[7] MR. WOLFE: Well, the other thing I would state for the record is that in this case neither of the young women have ever identified the defendant as being their

assailant. This is really not a matter that we're taking issue with the young women. They're not saying John Coy is the person who assaulted them.

THE COURT: From my reading of the Minutes, I anticipate that they're not going to identify his face as the face of the person who assaulted them.

MR. ROLFES: That's correct, your Honor.

MR. WOLFE: Certainly correct.

THE COURT: Which makes it quite a different set of circumstances.

MR. WOLFE: Right. This is an individual who they may have heard of, but they're not saying this is the individual who assaulted them.

THE COURT: If I do sign the order, I'd also request that when the equipment arrives that you should, of course, come and view it.

MR. WOLFE: I don't want to ask the court to go back through it again. I think I basically understand. There would be some type of opaque screen in front of the —basically here in front of the table; would that be correct?

THE COURT: The screen can be seen through [8] one way and not the other.

MR. WOLFE: I see.

THE COURT: I don't know, you know, how practical it is and what I'll do in order to proceed if I grant the State's application. The issue remains open. I'd assume the equipment won't be here till Monday. And counsel and his client have a right to inspect it at any time. And if you feel need to raise the issue to the court again, raise it and we'll take it up again.

• • • •

IN THE IOWA DISTRICT COURT
FOR CLINTON COUNTY

(Title Omitted in Printing)

RESISTANCE TO WITNESS SCREENING DEVICE

Filed Nov. 12, 1985

COMES NOW defendant and states:

1. That the State has requested and the Court has preliminarily indicated its approval of the use of a device screening the defendant from the view of two of the State's witnesses. The two State's witnesses are thirteen-year old girls who will testify that they were assaulted and were the victims of lascivious acts while they were camping in a make-shift tent in the backyard of one of the girls' residence.

2. The girls have indicated in depositions taken in connection with this matter that they are unable to identify the defendant as their assailant.

3. That the proposed device will confront the jury and will carry with it the connotation that the Court believes the defendant to be, in fact, the girls' assailant. The natural tendency to conclude that the screen is necessary because of the guilt of the defendant is demonstrated by an article which appeared in the November 8 edition of the *Clinton Herald*, a copy of which article is attached hereto. In that article, reference at one point is made to the need to have the screen between the girls and the "offender."

4. That the approach taken violates defendant's rights under the Sixth Amendment to the United States Constitution to confront witnesses against him.

5. That the approach also violates defendant's rights to due process of the law under the Fourteenth Amendment to the United States Constitution. The courts have stated in the past decisions that the defendant must be tried in an atmosphere which does not pre-establish his guilt. In order to enforce this right, the courts have spoken in terms of the need to allow the defendant in criminal proceedings to appear before juries in something other than prison garb. The courts have also indicated the right of the defendant to appear in trial proceedings without shackles or handcuffs, unless such security devices are clearly needed for the safety of all those at the trial.

WHEREFORE, the Court is requested to deny the State's application to use the aforementioned screening device, and to order that no screening device be used because such an approach would violate the defendant's rights under the Sixth and Fourteenth Amendments to the United States Constitution.

/s/ John J. Wolfe, Jr.
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IN THE IOWA DISTRICT COURT
FOR CLINTON COUNTY

(Title Omitted in Printing)

TRIAL TRANSCRIPT

November 13, 1985

• • • •

[11] There is an application on file by the State asking that a screen device be used to shield the 13-year-old girls, who are going to be witnesses. This is done under a statute that became effective July the first of this year, passed by the General Assembly of the State of Iowa. The State's application is on file. The defendant has objected and that objection has been filed in writing.

And before we proceed to further argument, the county attorney will proceed to set it up.

MR. ROLFES: Yes, your Honor.

• • • •

THE COURT: Make a record, please. They've set up a large screen, a picture of which will be taken at the direction of the county attorney and at the [12] direction of defense counsel by the police, and they'll make copies available to the parties. I'd ask counsel to stipulate into the record for appeal, if that's necessary. And it's a frame with a substance on it which makes it possible for the defendant to see the witness but the witness does not see the defendant.

Would you sit in the witness chair.

I'm seated where the defendant is. It is possible to dimly see a person seated in the witness chair. The motion is granted that defense counsel can move wherever he wants to in the courtroom.

I am also now going to sit in the witness chair.

I would make that record clear. You can see the features of the person seated in the witness chair, but it is dark.

I'm seated in the witness chair now, and I cannot see anyone at defense table. It reflects the bench. The thing does cause sort of a dramatic emphasis, but we'll have to instruct on it if we grant the motion.

Mr. Wolfe, come into view, will you?

Would you like to argue, please, beyond your written argument?

MR. WOLFE: Well, basically, your Honor—

THE COURT: And, by the way, you know, I [13] tried to accurately say what I thought the facts were, but you can disagree with that, too, you know.

MR. WOLFE: Well, the pictures will undoubtedly set forth what we have here. Our objection is based upon several constitutional principles. Certainly the first would go to the issue of the right of confrontation under the Sixth Amendment to the United States Constitution. It's been explained to me that one of the reasons why this device is being used is because it makes the young women less uneasy, but it's my understanding that the right of confrontation directly deals with that issue. I think most people coming into court in an atmospheric position—or many people—I won't say most—but many people would feel more comfortable if they didn't have to have direct eye contact with the person that they're testifying against. But the fact of the matter is that there are two issues, two sides: One is what the young women are saying; but the other is the fact that the accused has a right to confront his witnesses. If they have the right to know he's confronting them—you know, I know they're being told they can be seen, but, on the other hand, there's also the matter of them seeing him. Additionally, we would object on the grounds of due process. This would be based on several different things. The overwhelming thing that [14] this arrangement cer-

tainly seems to be some kind of a court statement that the defendant is guilty. The young women do not identify John Coy as their assailant. This is quite a different situation where someone has been brutalized and someone who says, that is the man who did it. That's not the case in this trial. The young women have been deposed and they have not identified John Coy as their assailant. So we have a situation that the young women obviously are not going to be able to look at him and say, no, that's not the man or, can you identify that person? and they say, no, that's not him, because they can't even see him. Now, they can be asked, and in their depositions, at least, what they indicated was that they could not identify their assailant—or they could not identify John Coy as their assailant. But you're going to be saying something else to the jury—and there is a series of cases dealing with the conditions that will indicate to a jury that the defendant is guilty. These have to do with such things as bringing the defendant into court in jail garb, bringing the defendant into court in shackles or handcuffs; all of these are set forth as being improper because it communicates somehow to the jury that the defendant, who is presumed to be innocent, in fact is not being presumed to be innocent, he's being treated as a guilty person. And this is one of the [15] problems with this very glaring, overwhelming device that's being set up, and it certainly seems to indicate that there's some reason why the young women should be fearful of the defendant when they're not identifying the defendant as being their assailant. Now, I'm saying that based upon the depositions that were taken a reasonable short period of time after this incident. And I assume that they have not changed their position and they're not now saying that John Coy is their assailant. I may be incorrect on that. But based on all of those things—and we're not talking about something that's minor, we're talking about something that's a glaring instrument, and there is no way that the jury can miss it. It's an extremely unusual

type of device. The jury is going to be sitting there and—as Mr. Gassman said when he was being questioned about whether or not he had any problems with the defendant, he said, well, after all, the deputy is there and that probably indicates that there's some reason why he's being held in custody. I would say that the deputy sitting there is one thing, with that device up there, it certainly indicates something else. And it cannot be cured, in my opinion, by any instruction.

Those basically are the grounds that we have. We would also say that the Act in question grants the court discretion, but it does not require this device. [16] And that under these circumstances where the defendant—pardon me—where the witnesses are involved cannot identify the defendant as their assailant and also because of the totality of the circumstances. There are different levels of brutality and different levels of sexual molestation. I'm not saying any of it is acceptable, but I am saying that there's a difference between someone being brutally beaten or being sodomized or sexual intercourse and what I think the young women will be testifying to in this case, particularly when they don't identify the defendant as their assailant.

THE COURT: Well, under the statute—in most cases there is an eyewitness identification made. How in the world does it work?

MR. WOLFE: Pardon?

THE COURT: Well, the case where the witness is going to make an eyewitness identification. Is that taken care of in the statute? I've read the statute several times.

MR. WOLFE: I don't know how they would do it. I admit it, I don't know how they would do it under those circumstances.

THE COURT: I've been thinking about it. I wonder if the General Assembly did.

Mr. Rolfes.

[17] MR. ROLFES: I'm not sure if the 71 General Assembly thought about that particular issue, your

Honor, at least I don't see it in the Act. However, at this time we need not concern ourselves with that because indeed, as Mr. Wolfe has stated, the two child victims cannot identify the assailant. However, with children as opposed to adults, the whole idea behind this statute, I guess, is a recognition of, 1, a defendant's right to confrontation; and, 2, a protection of a child victim, even if the victim doesn't know, yes, indeed that is the man that molested me. If the child knows that that person is indeed in the courtroom that, of course, is going to create trauma for the child. It would be easier for the cihld if that person were behind a screen, as contemplated in the statute. The child does not have to look at this assailant, does not have to view this assailant. The screen, I'm sorry to say, with the lights in this room, didn't work quite like we had planned.

THE COURT: I can't see anybody now. Can't see a thing.

MR. ROLFES: The only thing we have to do is add the lights.

THE COURT: I know.

MR. ROLFES: In the other room it appears to work better.

[18] THE COURT: I would note I would rather have the lights on than not have ceiling lights on in the courtroom because it would be eerie, and we're in dark weather right now. Go ahead.

MR. ROLFES: As far as the right of confrontation is concerned, the defendant can view the witness, can confer with his attorney as if he were face-to-face with the victims. I don't know how far the constitution goes or how far our forefathers thought when they said, thou shalt have a right of confrontation. It appears to me that the defendant has to be able to see his accuser and he can do that under this setup here. Does the right of confrontation require him to seat two feet away or six feet away or 20 feet away? Our constitution doesn't

really tell us that. I think the right of confrontation is the right to have a witness know that the defendant is in the room and that the defendant can see and hear the witness. I don't think the right of confrontation goes much more than that.

If the court feels that this screen would be prejudicial, I would ask the court, then, to consider a closed-circuit television from Judge Pelton's chambers into the courtroom via use of the equipment at the Clinton County Law Center. That could be set up in the other room and a screen could still be used. A jury would [19] not even be aware of a screen, but the jury could view the child witnesses' testimony via the closed-circuit.

THE COURT: End of argument?

MR. ROLFES: Yes, your Honor.

MR. WOLFE: If I could respond. One aspect of Mr. Rolfes' argument is exactly what bothers me in this approach and that's when he said if the young women have not identified the defendant being their assailant but if they know he is in the courtroom and he apparently being their assailant. Now, the only way you reach that point is to make a nice jump from the presumption of innocence to a presumption of guilt, and at that point we are asking the young women for simply testifying about what they know. They have no reason to presume this man is guilty. Like everyone, they should be prepared to presume he's innocent. They're testifying about what they know about this case. Now, there's someone who's accused, but this isn't a contest between the two complaining witnesses, or the two 13 year olds, and Mr. Coy, they're testifying to facts and it's up to that jury to determine whether or not it establishes this man's guilt. What that screen is based on is a presumption; that is, he is, and based on that presumption, therefore, it makes sense to have that screen there. The other problem we're dealing with—and one that I really didn't address but Mr. Rolfes again [20] brought it up—is this whole matter of right to counsel. Where is the attorney

on this throughout the trial? I'm going to be seated next to my client. Now, you know, am I going to remain seated next to my client when I'm cross-examining the young woman? If so, they're going to have an eerie situation where there's going to be this undisclosed voice coming from behind the blackboard.

THE COURT: You're going to be wherever you wish to be within the rail.

MR. WOLFE: Well, I would state that is going to create an unusual situation if counsel is going to be addressing witnesses without being able to be seen by them and not being able to be seen by many members of the jury. If I want to get up and move over here, I can, but—I guess what I'm saying is this is creating an unusual and an artificial situation, and the message being conveyed is that this man is guilty. And that is the presumption that exists, and the question is whether or not the jury can overcome that presumption. And it's our position that that violates the defendant's right to due process of law and the Fourteenth Amendment to the United States Constitution.

THE COURT: I will rule. The points raised by Mr. Wolfe are substantial and are worthy. The statute is presumed to be constitutional. Putting it in the [21] context of what we actually have here and the statute, I rule that the situation as proffered is not violative of the right to confrontation. There is danger of making illusions of presumptions contrary to the presumptions at law, and there should be and must be an instruction to the jury concerning the fact that the screen is not an inference of any kind. And both the county attorney and the defense counsel are invited to supply the court with requested instructions in that matter. And the county attorney's motion to use the device as proffered is granted. The police will take several pictures of it at the direction of Mr. Wolfe and at the direction of Mr. Rolfes, and those pictures will be made available to both and should be made a part of the record for appeal.

The court anticipates the possibility that certain questions may be put to witnesses that are proper questions, maybe proper direct examination, perhaps proper cross-examination in which it will be necessary to remove the screen. That's certainly possible. That would have to be done from the bench at the time. But it certainly is possible that the right to the pseudoprivacy may give way to the constitutional need for people to see each other, and that will be taken up if such question is asked, and if it's a question that's admissible and if it's necessary to remove the screen, it should be [22] anticipated that there's a possibility that the screen will be removed at some point. All to which the defendant excepts. That ends that.

Anything else that should be brought up at this hearing?

MR. ROLFES: I don't believe so, your Honor.

MR. WOLFE: No, your Honor.

THE COURT: Thank you. Close the record.

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[33] THE COURT: It's quite obvious to the jury that there's a screen device in the courtroom. The General Assembly of Iowa recently passed a law which provides for this sort of procedure in cases involving children. Now, I would caution you now and I will caution you later that you are to draw no inference of any kind from the presence of that screen. You know, in the plainest of language, that is not evidence of the [34] defendant's guilt, and it shouldn't be in your mind as an inference as to any guilt on his part. It's very important that you do that intellectual thing.

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[36] N.C.,

witness herein, called as a witness by Plaintiff, having been first duly sworn, was examined and testified as follows:

THE COURT: Please take your time.

MR. WOLFE: Your Honor, at this time I would like to enter an objection to the use of the screen device, which was placed here, based on our objection, in violation of my client's Sixth Amendment rights to the United States Constitution, to the right to confront witnesses, and his Sixth Amendment right, to a full, effective counsel, because of problems I see with this, and his rights under the Fourteenth Amendment to the United States Constitution, to due process of law.

THE COURT: The objection is overruled.

And as augmented by and in conformity with previous rulings, counsel is, of course, free to position himself anywhere within the rail and is not limited to being behind the screen. And I anticipate that there might be situations in which the screen might have to be removed.

[37] DIRECT EXAMINATION

BY MR. ROLFES:

Q. N., do you prefer that I call you N. or Miss C?
A. N.
Q. Where do you go to school, N?
A. Lyons Middle School.
Q. What grade are you in?
A. Eighth.

• • • •

Q. N., do you know a girl by the name of C. B.?
A. Yes.
Q. How do you know her?
A. She goes to school with me.
Q. Is she your friend?
A. Yes.
Q. August 2, 1985 was a Friday, I believe. Did you have any conversations with C. that day regarding the two of you getting together?
A. Yes.

Q. What did you girls decide to do?
A. Spend the night at her house.
Q. What were you going to do there?
[38] A. Sleep in a tent.
Q. Where at?
A. In her backyard.
Q. What time did you go over to C.'s house?
A. Between 9 and 9:30.
Q. Is that in the morning or at night?
A. Night.
Q. N., this tent, describe it to me a little, will you, please?
A. It was two tables put together with blankets over them.
Q. Did you help build this tent?
A. No.
Q. Were you over at C.'s house at all that Friday building this tent?
A. No.
Q. Were you over at her house at all?
A. No.
Q. Not until you went there about 9 o'clock that night; correct?
A. Right.
Q. What did you bring with you?
A. A sleeping bag and a pillow?
Q. Anything else?
A. No.

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[46] Q. N., when this man came into that tent, what was it like inside the tent?
A. It was pretty dark.
Q. Were you able to see this man?
A. No.
Q. Why not?
A. Because it was dark. He also was shining the flashlight in our eyes.

• • • •

[48] Q. Now, N., did you ever get a good look at this man's face?

A. No.

Q. Did you have any impression with regard to the way he wore his hair?

A. He had like a little thing sticking out?

Q. How would you describe that?

A. It was a little tail; it wasn't very long, and it was braided.

• • • •

[49] Q. Do you think you could identify that man who was in the tent that night?

A. No.

Q. You never got to really see him, did you?

A. No.

• • • •

[55] CROSS-EXAMINATION

BY MR. WOLFE:

• • • •

[59] Q. Now, during this hour to hour and a half that the assailant was in the tent, I think you testified that you noticed something regarding his hair. Were you also able to tell from looking at his hair what the color was?

A. Maybe blondish brown.

Q. Blondish brown. How would you describe what you observed? Was it just hair hanging down or was it some kind of a braid or some kind of ponytail? Or how would you describe it?

A. In the back there was like a little braid.

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[64] Q. Now, within a few seconds after the person left, did either you or C.—well, did you hear—strike that. Did you hear anything unusual, such as a car starting, or anything like that?

A. Yeah.

Q. What was that?

A. A motorcycle.

[65] Q. You heard a motorcycle start. How close in time was that to when the assailant left before you heard the motorcycle start?

A. A couple of seconds.

• • • •

[69] Q. So you were trying to tell the truth as you best recalled it at that time.

A. Yes.

Q. Since then, of course, you've had a chance to discuss some of this with the county attorney's staff.

A. Yes.

MR. WOLFE: I have no other questions.

REDIRECT EXAMINATION

BY MR. ROLFES:

Q. N., just a couple of questions.

In preparing for this trial, you and I have talked about this, haven't we?

A. Yes.

Q. Now, do I tell you what to say?

A. No.

MR. ROLFES: That's all.

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[72] C.B.,

witness herein, called as a witness by Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ROLFES:

Q. Would you prefer that I called you Miss B. or C. or C.?

A. C.

Q. C., where do you live?
A. Clinton, Iowa.
MR. WOLFE: Your Honor, at this time, just for the record, I'd like to enter the objection I previously made regarding the screen, and the same grounds.
THE COURT: Same ruling.
MR. WOLFE: Thank you.

* * * *

Q. Who do you live there with?
A. My mom, my dad and my two sisters.
Q. Older sisters or younger sisters?
A. Older.
Q. You're in the eighth grade?
A. Yes.
Q. How are you doing in school?
[73] A. Pretty good.
Q. As a matter of fact, you just had parent-teacher conferences, didn't you?
A. Yes.
Q. C., you and N.C. are close friends; right?
A. Yes.
Q. You girls go to school together.
A. Yes.
Q. You spent some time together this summer.
A. Yes.
Q. One night this summer you invited N. to come over and spend the night, did you not?
A. Yes.
Q. What were you girls going to do?
A. Sleep in a tent out in our backyard.
Q. A regular tent or what?
A. Well, two Ping-Pong tables with blankets over it.
Q. Now, did you engineer this thing?
A. Me and my neighbors.
Q. Your neighbors were over once in a while to give you some help?
A. Yes.

Q. Was N. ever over there that day to help you build that?
[74] A. No.
Q. Did you call N. or did she call you?
A. I called N.
Q. What time, if you recall, did she come over to your house?
A. Between 9 and 9:30.
Q. At night?
A. Yes.
Q. It was a Friday night; right?
A. Yes.
Q. Did you girls stay in your parents' home for a while?
A. Yes.
Q. What time do you think it was that you went outside?
A. About 10 o'clock.
Q. Were you girls going to sleep in your sleeping bags?
A. Yes.
Q. Did you have one too?
A. Yes.
Q. Pillow?
A. Yes.
Q. What else did you bring out there?
A. A lamp, cookies, pop, a Simon game.
[75] Q. How were you going to drink the pop?
A. Oh. And two cups.
Q. What kind of cups were those?
A. They were plastic, and they were yellow with a white rim inside.
Q. Where did you get those cups?
A. In the house, in the cupboard.
Q. Did you bring anything to see with you?
A. A lamp and a flashlight.
Q. Whose flashlight was it?
A. My dad's.

Q. How many cups did you bring with you?
A. Two.
Q. The next morning were there still two cups in there?
A. No.
Q. How many?
A. One.
Q. Was your flashlight still in the tent?
A. No.
Q. Now, this tent, did you lay some blankets down on the grass?
A. Yes.
Q. Spred them out, sort of?
A. Yes.
[76] Q. Put your sleeping bags on top of that?
A. Yes.
Q. And your pillows?
A. Yes.
Q. C., I show you what has been marked as State's Exhibit 1C for identification and would ask you, do you recognize this?
A. It's my sleeping bag.
Q. Is it, oh, substantially in the same condition as it was when you had it there on August 2 sleeping in the tent?
A. Yes.
MR. ROLFES: I offer State's Exhibit 1C in evidence as State's Exhibit No. 1C.
MR. WOLFE: No objection, your Honor.
THE COURT: Exhibit 1C is admitted in evidence.
Q. You also had a pillow; right?
A. Yes.
Q. C., I show you what's been marked as State's Exhibit 1D and ask if you recognize this.
A. My pillow.
Q. This was in the tent with you that night?
A. Yes.

MR. ROLFES: I offer State's Exhibit 1D in [77] evidence.
MR. WOLFE: No objection.
THE COURT: Exhibit 1D is admitted in evidence.
Q. Now, you mentioned you had a couple of blankets; right?
A. Yes.
Q. I show you what has been marked as State's Exhibit 1F for identification. Do you recognize this?
A. My blanket.
Q. Was this the blanket that you used for the floor of your tent that night?
A. Yes.
MR. ROLFES: I offer State's Exhibit 1F in evidence.
MR. WOLFE: No objection.
THE COURT: State's Exhibit 1F is admitted.
Q. C., I show you what has been marked as State's Exhibit 1E for identification and would ask if you recognize this.
A. A blanket.
Q. Is this also another blanket that you girls used for floor and bedding—
A. Yes.
Q. —inside your tent?
[78] A. Yes.
Q. And all this stuff you had in there that night when you and N. slept in your backyard; correct?
A. Yes.
MR. ROLFES: I offer State's Exhibit 1E in evidence.
MR. WOLFE: No objection.
THE COURT: Exhibit 1E is admitted in evidence.
Q. Now, C., this was August 2 of this year. About what time that evening did you and N. go out to your tent?
A. About 10 o'clock.
Q. And you had all those things with you that we've just gone through; correct?
A. Yes.

Q. The sleeping bag and the pillow and the blankets.
A. Yes.
Q. What did you girls do when you got out to this tent?
A. We drank pop, and we played a Simon game.
Q. Did your Simon game have any batteries?
A. Well, we had to take them out of a flashlight.
Q. Whose flashlight?
A. My dad's.
[79] Q. C., I show you what I've marked as State's Exhibit 2C. Do you recognize this?
A. Our batteries.
Q. Look just like them?
A. Yes.
Q. I show you what's been marked as State's Exhibit 2B. Do you recognize this?
A. My batteries.
Q. These are batteries you took out of your flashlight?
A. Yes.
Q. At least they're just like the batteries; right?
A. Yes.
Q. C., I show you what's been marked as State's Exhibit 2A for identification. Do you recognize this?
A. A flashlight.
Q. Whose flashlight?
A. My dad's.
Q. Did you have a flashlight just like this in your tent that night?
A. Yes.
MR. WOLFE: Objection. The question is leading. The witness has already answered the question on the basis of the previous question.
THE COURT: The answer may stay in.
[80] Q. Now, C., did the flashlight that you had have white stuff over it?
A. No.

Q. Other than that, would you say it's very similar to yours?
A. Yes.
Q. What time do you think you girls went to sleep?
A. 10:30 or 11.
Q. You don't really know for sure, though, do you?
A. No.
Q. Now, C., you're asleep inside your tent. What is the next thing you recall happening?
A. I saw a man crawl into our tent.
Q. Were you sort of wakened up?
A. Yeah. I was half awake.
Q. What happened next?
A. The man grabbed our throats.
Q. Both of yours?
A. Yes.
Q. Did he say anything?
A. He said, "If you scream, I'll knock you out."
Q. What did you do?
A. We just sat there.
Q. Were you laying down or sitting up?
A. Laying down.
[81] Q. What happened next?
A. He asked us our age.
Q. What did you tell him?
A. Thirteen.
Q. Did he ask you anything else?
A. He said, "I only thought there would be one of you in the tent."
Q. Do you recall if he asked you any other kinds of questions?
A. He asked us if we were virgins.
Q. Did you know what a virgin was?
A. No.
Q. Then what happened?
A. He told us to get out of our sleeping bags.
Q. Did you do that?
A. Yes.

Q. What happened then?
A. He told us to take our clothes off.
Q. Did you do that?
A. Yes.
Q. Did you take off all of your clothes?
A. We left our panties on.
Q. How come?
A. Because he told us to leave them on.
Q. Then what happened?
[82] A. He started feeling us around.
Q. Where did this man touch you?
A. In the breast and the vagina.
Q. What do you next recall happening, C.?
A. He told us to take our panties off.
Q. Did you do that?
A. Yes.
Q. Then what happened?
A. He started feeling us around again.
Q. Where?
A. On our breasts and our vaginas.
Q. Did this go on for a while?
A. Yes.
Q. What happened to your panties?
A. He put them in this white bag.
Q. Was it your white bag or his?
A. His.
Q. Do you recall what next happened?
A. He started kissing us on the cheeks and lips.
MR. WOLFE: I can't hear you.
MR. ROLFES: Speak up a little bit more, okay?
THE WITNESS: Yes.
THE COURT: Mr. Reporter, so that the jury can hear, read the last answer.

(Whereupon, the requested portion of the [83] record was read back by the reporter.)

Q. C., could you see this man?
A. Not very good.

Q. How come?
A. Well, it was dark, and he shined his flashlight in our eyes.
Q. Did you try to look at him?
A. No.
Q. How come?
A. We were too scared.
Q. Were you scared?
A. Yes.
Q. Did you cry, or anything like that?
A. No.
Q. Shake?
A. Yes.
Q. So what happened next?
A. He took his clothes off.
Q. Then what happened?
A. He made us touch his penis.
Q. Did you?
A. Yes.
Q. Because he told you to?
A. Yes.
Q. But you girls didn't want to do this, did you?
[84] A. No.
Q. Do you recall what the next thing is that happened?
A. He made us put our mouth on his penis.
Q. Did you do that?
A. Yes.
Q. Then what happened?
A. He made us lay back down.
Q. Was he getting ready to go then, do you recall?
A. Well, yeah.
Q. What do you recall happening next?
A. He went to the bathroom in the yellow cup.
Q. One of those cups that you had brought out to the tent?
A. Yes.

Q. Did you go to the bathroom?
A. No.
Q. Was there any discussion about that?
A. He asked us if we had to go to the bathroom.
Q. Did he ask you to do anything?
A. He asked us to go in his face, but we didn't have to go.
Q. Was it afterwards, then, that this man urinated in this cup?
A. Yes.
Q. Could you see him do that?
[85] A. No.
Q. How do you know he was doing that?
A. He told us.
Q. Did you also hear him?
A. Yes.
Q. Now, C., was it sometime after that that this man left?
A. Yes.
Q. Did he talk to you girls before he left?
A. He was trying to think of a way to get out without us telling.
Q. Did you have any conversations with this man at all about telling people what happened?
A. He was being really nice to us, and he said, "If you told, you'd have to go through a lot of things."
Q. So the man has had you lay back down. What do you recall happening next, then, C.?
A. He tied us up.
Q. How did he tie you up?
A. With my jogging pants.
Q. Did he tie up your legs or your hands or what?
A. Our arms, to the back.
Q. Your arms to your back?
A. Yes.
Q. And then what happened?
[86] A. He was trying to look for a flashlight and he said all these naughty words.

Q. And then what happened?
A. He got together all his stuff, and then he said he'd be back in two seconds. He never came back.
Q. Did you girls stay out in the tent a while?
A. For about 15 minutes.
Q. How come?
A. Because we thought he was going to come back.
Q. Were you scared?
A. Yes.
Q. When this man left, did he take anything of yours with him?
A. He took our panties and the cup and the flashlight.
Q. The flashlight that you identified earlier?
A. Yes.
Q. Now, C., inside your tent, when this man came in, how would you describe that?
A. He was muscular and he was pretty tall and he had a mask on. (sic)
Q. What was it like inside your tent?
A. It was dark.
Q. You really couldn't see very well at all, could you?
A. No.
[87] MR. WOLFE: Objection.
THE COURT: The answer goes out. You're leading too much.
Q. Did you look at this man very much?
A. Not very much.
Q. Why not?
A. Because we were scared. He looked scared.
Q. Any other reason?
A. It was dark.
Q. Would anything happen if you tried to look at him?
A. He'd shine the flashlight in our eyes.
Q. Now, C., was this man wearing any jewelry, that you could tell.
A. He had a watch.
Q. You could see that?
A. Yes.

Q. How was his watch worn?
A. It was halfway up his arm, almost to his elbow, and it was—the face was upside down.
Q. What do you mean "upside down"?
A. It was right here.
Q. Do you want to show these people how this watch was worn.
A. It was way up here, and it was upside down. The face was right here.
[88] Q. Do you recall much about that watch? What kind of band it had, or anything like that?
A. It was a stretch band.
Q. Now, this man himself, what, if anything, did you notice about his hair?
A. It was blondish brown, and he had a little pony-tail in the back and I think it was braided.
Q. Are you positive?
A. No.
Q. Why not?
A. Because it was dark.
Q. Did you also think you saw something else?
A. I thought I saw a green mask on him; and he had holes in the eyes, the mouth and the nose, and then right here he had makeup.
Q. C., are you absolutely positive about that?
A. No.
Q. Why not?
A. Because it was dark.
Q. If you saw that man again, would you be able to identify him?
A. No.
Q. Why not?
A. Because he probably looks different.
Q. Did you ever have a good look at him?
[89] A. No.
Q. Now, C., this hair that you mentioned, ponytail or whatever, what was your impression as to how long this was?

A. It was only about an inch long.
Q. Are you positive it was braided?
A. No.
Q. C., in preparing for this trial, you and I have come into this room and talked, haven't we?
A. Yes.
Q. And you tell me what you're going to say; right?
A. Yes.
Q. Do I tell you what to say?
A. Kind of.
Q. Do I have you make things up?
A. No.
Q. Do I have you tell the truth?
A. Yes.
MR. WOLFE: Your Honor, I would object for the leading nature of the questions.
THE COURT: Well, don't lead, but there's no question to rule upon at the moment. Some of those questions were not leading.
Members of the jury, a leading question is a question which suggests the answer.
[90] Go ahead, Mr. Rolfes.
Q. C., sometime ago you submitted what we call a deposition, didn't you?
A. Yes.
Q. Now, in preparing for trial, did you review that again?
A. Yes.
Q. Do you recall that deposition?
A. Yes.
Q. Mr. Wolfe was asking you questions; right?
A. Yes.
Q. How would you describe the man's voice?
A. It was pretty low.
Q. C., during this time that this man was in the tent with you, did you have any contact of any kind with N.?
A. He made us kiss each other.

Q. Did he tell you anything more?
A. He said, "Feel like you're enjoying it."
Q. C., when this was all over, sometime later did Sergeant Lyle Smith come to your home?
A. Yes.
Q. Why did he come to your home?
A. He had to take hair samples.
Q. Did you give him some?
[91] A. Yes.
Q. What kind of hair samples did you have to give him?
A. Head hair and pubic hair samples.
Q. Did that hurt to do that?
A. A little.
Q. Then what did you do with them after they were pulled?
A. I gave them to Lyle Smith.
Q. Did you put them in something?
A. An envelope.
Q. C., I show you what has been marked as State's Exhibit 7C for identification. Can you identify that?
A. Yes.
Q. What is it, please?
A. Hair samples.
Q. Is State's Exhibit 7C an envelope in which you put your head hairs?
A. Yes.
Q. I show you what has been marked as State's Exhibit 7D for identification. Would you identify that?
A. Pubic hair samples.
Q. You put them in this envelope?
A. Yes.
Q. And you gave them to Detective Sergeant Lyle Smith?
[92] A. Yes.
MR. ROLFES: I offer State's Exhibit 7C in evidence.
MR. WOLFE: No objection.
THE COURT: State's Exhibit 7C is admitted.

MR. ROLFES: I offer State's Exhibit 7D into evidence.
MR. WOLFE: No objection.
THE COURT: State's Exhibit 7D is admitted into evidence.
Q. Now, C., after this man left, what was it that was missing from your tent?
A. The cup, the flashlight and our panties.
MR. ROLFES: Thank you. I don't have any further questions.
THE COURT: Mr. Wolfe will talk to you now.
MR. WOLFE: Your Honor, can counsel approach the bench?
THE COURT: You may.

(Whereupon a discussion was had out of the hearing of the jury and reporter.)

THE COURT: Mr. Wolfe will address the jury.
MR. WOLFE: Ladies and gentlemen of the jury, unfortunately attorneys make errors in keeping their material together. The previous witness—there was an [93] exchange regarding the height of the assailant, and in seeking to raise questions whether or not there had been a prior inconsistent statement regarding the height, I made reference to a deposition. It was my error. I was making reference to Miss B.s' deposition, not to Miss C.s' deposition. And in order not to have anyone misled, it should be understood that the deposition taken on August 21, on page 32, lines 8 through 17, the exchange took place:

> "Now, going with your assailant, I realize he never stood up or you didn't see him when he stood up. Is there any way you can describe, though—was he short? Did you have the impression he was short? Did you have the impression he was tall, medium?"

The answer was:

> "Tall—medium."

Which is consistent with what the witness testified to from the stand, and I didn't want to leave the impression that she had incorrectly stated it at an earlier time.

THE COURT: Have you understood what Mr. Wolfe said?

The indications are affirmative.

You may cross-examine.

[94] MR. WOLFE: Thank you.

THE COURT: Thank you, Mr. Wolfe.

CROSS-EXAMINATION

BY MR. WOLFE:

Q. Hi.

A. Hi.

Q. We've had a chance to meet before, haven't we?

A. Yes.

Q. In fact, I made reference to August 21, what was called depositions, and we met at that time, didn't we?

A. Yes.

Q. The same subject was discussed; is that correct?

A. Yes.

THE COURT: Before we start, is there any juror that can't sit for another 20 minutes? I really think it would be wise—we've been sitting a long time. We will recess now for at least 10 minutes.

Remember the admonition.

(Whereupon, court was recessed at 11:20 a.m., on November 14, 1985, and reconvened at 11:33 a.m., on November 14, 1985.)

THE COURT: C. B. is on the stand, and she is under oath.

And, Mr. Wolfe, you may cross-examine.

[95] BY MR. WOLFE:

Q. Good morning.

A. Hi.

Q. We had a chance to meet a couple weeks ago—no, it would be more than that—probably more like a couple months ago. That was, I believe, August 21, which would have been roughly three weeks after this incident took place; is that correct?

A. Yes.

Q. Now, what I'd like to do is to go over a few points to just clarify some of the matters. It's been your misfortune, shall we say, to discuss this with many different people since August 2; is that correct?

A. Yes.

Q. In fact, immediately after the incident you discussed it with some investigating officers for purposes of helping them identify who the assailant would have been.

A. Yes.

Q. And then after that you, of course, discussed it with myself and Mr. Rolfes at depositions. And then more recently you've had a chance to review some of that here in the courtroom; isn't that correct?

A. Yes.

Q. By that, I mean earlier this week, before we convened here, you had a chance to go through some of this [96] with Mr. Rolfes.

A. Yes.

Q. Now, at the time that you spoke to the police officers immediately after the incident or at the time the deposition was given, at all those times you were teiling the facts as best you could recall them, weren't you?

A. Yes.

Q. Now, at both of those times—in other words, in discussing the matter with the police and also later discussing it with me, you recalled your assailant wearing a mask, didn't you?

A. Yes.

Q. Now, could you explain for the jury what you recall that mask being? How did it look?

A. I think it was green, and it had holes cut in the eyes and nose and the mouth and right here.

Q. Now, you think it was green. Was it like one piece of material, is that all it was?

A. Well, it looked like it was tied together, like little knots.

Q. Possibly like a sock, or something like that, that was wound around the head?

A. Yes.

Q. What was the color of the sock?

A. I think it was green.

[97] Q. Now, was there anything else over that? Was there anything in addition to that?

A. It looked like there was a nylon over it.

Q. A nylon over the top of it?

A. Yes.

Q. Now, you mentioned that the sides were cut out where the cheeks were at; is that correct?

A. Yes.

Q. Was there also an area cut out for the eyes?

A. Yes.

Q. Was there also a point for the mouth?

A. Yes.

Q. I don't know, was there for the ears and for the nose? I don't want to suggest there was. I don't know whether or not there was.

A. I think so.

Q. Now, was there any kind of makeup, that you could see?

A. Well, I think there was white stripes and red stripes.

Q. Various colored stripes?

A. Yes.

Q. Would that be red, white and also some other colors?

A. I can't remember.

[98] Q. Now, in attempting to help the police identify your assailant, do you recall talking to a Detective Speakman?

A. Yes.

Q. Did you tell him about the ponytail?

A. I don't remember.

Q. Now, if he would indicate that you made reference to a ponytail, blondish brown, extending approximately three to four inches below the mask, would that seem to be consistent with what you probably told him?

A. It was about an inch long.

Q. So if he put down three to four inches, would it be your recollection that you didn't say that at that time or that he got it incorrect?

A. I don't know.

Q. This would have been the morning after it took place?

A. (No verbal response.)

Q. You're not sure?

A. No.

Q. Now, C., at various times did you come into close contact with the assailant from the standpoint of being required to kiss him?

A. Yes.

Q. In fact, that was on about three different [99] occasions during the course of the time that he was in the tent; is that correct?

A. I don't remember.

Q. But it was more than once?

A. Yeah.

Q. One of those times you said he kissed you on the cheek.

A. Yes.

Q. Another time he kissed you on the mouth; is that correct?

A. Yes.

Q. Was there one point where he grabbed your hair and forced you to kiss him?

A. I think so.

Q. Now, in all those times, of course, you were in direct contact with his face. That's, of course, correct, isn't it?

A. Yes.

Q. Was it your impression at all of those times that he had a mask on?

A. I'm not sure.

Q. Well, you've had a chance to review the deposition you gave on August 21.

A. Yes.

Q. Now, do you recall that in there you gave a rather [100] detailed explanation of this mask?

A. Yes.

Q. In giving that explanation, did you believe that the man actually had a mask on?

A. I'm not sure.

Q. Well, you were under oath at that time, weren't you? You were supposed to tell the truth.

A. Yes.

Q. And you sought to do so, didn't you?

A. Yes.

Q. Now, at that time you indicated that your assailant wore a mask.

A. Yes.

Q. And you described it the way you've described it to the jury now; is that correct?

A. Yes.

Q. In doing that at that time, you were telling the matter as you thought to be correct; isn't that true?

A. Yes.

Q. Now, were you provided with copies of the deposition that you gave?

A. Yes.

Q. Was N. supplied with a copy of the deposition she gave?

A. Yes.

[101] Q. Did you become aware of the fact that there was an inconsistency between what she said about the mask and what you said about the mask?

A. Yes.

Q. Now, you've also testified about a watch. Now, some watches—watches are getting to be very fancy. Some watches have a luminous dial and also luminous numbers, I believe, and I'm sure it's true some watches even light up. You can punch a little button and they light up. Now, you indicated that the face of this watch was upside down. What was on the face? I mean was it a watch with a face similar to the courtroom clock, where there are numbers on it, was it somehow or another lit up? In view of the fact that the face was upside down, I gather you saw the face.

A. Yes.

Q. Can you describe what the face looked like?

A. There were numbers on it.

Q. Now, somewhat similar to that? Is that the style we're talking about?

A. Yes.

Q. Now, the assailant was wearing some type of pants or trousers when he came into your tent.

A. Yes.

Q. To your recollection, you can't recall anything [102] else that he had on?

A. No.

Q. Is it your recollection that the trousers were rolled up above his knees?

A. Yes.

Q. They were rolled up somewhat above his knees, was that correct?

A. Yes.

Q. And that they were blue trousers; is that correct?

A. Yes.

Q. And that they also had a white stripe or maybe what we'd call white piping down the side?

A. Yes.

Q. Was the white on any other place or was it just down the side?

A. I think just the side.

Q. Was there also in the tent some kind of a Tupperware holder? I think you mentioned that you had some cookies with you.

A. Yes.

Q. Could you describe that for the jury? Was that like a pan with a lid on it? How would you describe it?

A. It was a plastic white thing, and you could see through it, and it had a lid on it.

Q. Was that in the tent when the assailant was there?

[103] A. Yes.

Q. During the course of the assailant's stay in your tent, did he end up moving many of your items around?

A. He knocked some over.

Q. He had contact with the clock you had in there; is that correct?

A. Yes, he looked at it.

Q. He also grabbed your flashlight and he took your flashlight.

A. Yes.

Q. Do you recall whether or not he had any contact with the Tupperware?

A. No.

Q. You don't know, is that it?

A. (No verbal response.)

Q. Now, did the assailant take the underpants?

A. Yes.

Q. How long would you estimate that the assailant was in the tent with you?

A. About an hour and a half.

Q. Do you know what time it was you went into the house?

A. About five minutes to 6.

Q. By 6 o'clock on August 2, was it light?

A. Yes.

[104] Q. Now, were you able to notice that it was getting lighter earlier in the morning?

A. Yes.

Q. Was that because your assailant would look out the side of the tent at times?

A. You could see the light coming through.

Q. So the light—it was tending to light up the tent a little bit itself; is that correct?

A. Yes.

Q. Now, you've testified that the assailant urinated in one of the plastic glasses that you had. Was this before or after he was lying down between you and Miss C.?

A. Before.

Q. Before. Okay. And then sometime after that he spent some time trying to figure out how he could leave and get away; is that correct?

A. Yes.

Q. And at that point he was just lying between you and N.

A. Yes.

Q. Now, did you ever notice what happened to the urine in the cup? That sounds rather silly, perhaps, but did he throw it out or did he just put it down or did he take it with him when he left? I'm not talking about the [105] cup, I'm talking about what was in it.

A. I think he took it with him.

Q. So that was just sitting someplace in the tent, and then later on, when he left, he picked it up and he took it with him.

A. Yes.

Q. Now, if I could just ask you something else in connection with the watch.

You've indicated you could see that the face was upside down, and you've indicated that there were numbers on the face. Was this a luminous dial or—how were you able to see the numbers in view of the fact that it was dark in the tent?

A. It was getting lighter by that time.

Q. So you were able to see it by just looking at it?

A. Yes.

Q. Now, after your assailant left, did you hear a motorcycle start up?

A. Yes.

Q. A rather loud motorcycle?

A. Yes.

Q. Was this, say, half a minute or so after you heard him leave the tent?

A. Yes.

Q. Did that come from the general direction that would [106] be from the street in front of your house?

A. I think it was in back of my house.

Q. After you heard that motorcycle start up, did you ever see the assailant again?

A. No.

Q. Now, had you ever used this tent before?

A. Yes.

Q. Had you ever had any of your friends come over and join you?

A. My neighbors had.

Q. Your neighbors had. Would the tent be taken down and then put back up? Is that the way it worked?

A. Yes.

Q. Do you have any idea how many times you had done this before? Was it maybe once or twice or was it frequently?

A. Twice.

Q. Twice. Okay. Now, do you recall what height your assailant was?

A. He was pretty tall.

Q. Do you recall telling me at the time your deposition was taken that he was probably about medium height?

A. Yeah.

Q. Yes?

[107] A. Yes.

Q. Now, at that time was that your best estimate of what his height was?

A. Yes.

Q. Do you have any reason to change that now?

A. No.

Q. So you would think he would have been about medium height.

MR. ROLFES: I would ask counsel, your Honor, where at in the deposition he's referring to.

THE COURT: Are you going to pursue the deposition?

MR. WOLFE: No.

THE COURT: Show him what you're talking about.

Q. Now, when the assailant left your tent, he took a number of things with him, didn't he?

A. Yes.

Q. It would be your recollection that he took a cup that had some urine in it.

A. Yes.

Q. And he took a flashlight he had brought with him and a flashlight that you had in the tent.

A. Yes.

Q. He took the underpants that belonged to you and [108] N.

A. Yes.

Q. And, of course, he had on the blue trousers with the white piping.

A. Yes.

Q. It was your recollection the next day and at the time the deposition was taken that he also left with the mask on his face; is that correct?

A. Yes.

Q. Is there anything else you can recall that he took?
A. He took his white bag.
Q. He took his white bag.
A. Yes.
Q. One other thing. Is it your recollection what the color of his hair was, the hair that you saw?
A. Blondish brown.
MR. WOLFE: I have no other questions.

REDIRECT EXAMINATION

BY MR. ROLFES:

Q. C., you heard a motorcycle start; right?
A. Yes.
Q. Are you sure how much time elapsed between the time this man left and the time this motorcycle started?
MR. WOLFE: Objection. The question is [109] leading.
THE COURT: Overruled. You may answer.
THE WITNESS: No.
Q. Was it quiet outside?
A. Yes.
Q. Are you sure from what direction you heard this noise?
A. I'm not really sure.
Q. Are you sure how far away this noise was?
A. No.
MR. WOLFE: Your Honor, I would continually object to the questions as leading.
THE COURT: Just do it on time and you'll have your record. She answered. That time you had time to object, and the objection is not timely. The answer may stay in. There will be no standing objection.
C., don't answer very rapidly. Pause a little bit so that Mr. Wolfe can object.
MR. ROLFES: I have no further questions.
THE COURT: Mr. Wolfe.

RECROSS-EXAMINATION

BY MR. WOLFE:

Q. C., do you recall telling Detective Speakman about the motorcycle.
A. Yes.
[110] Q. If it was his recollection that you said you heard it start about 30 seconds after the assailant left the tent, would that probably be what you told him?
A. Yes.
Q. But you are also saying that was an estimate, and it may have been a minute or two minutes or three minutes, but it was shortly after the assailant left the tent. Would that be a correct way to put it?
A. Yes.
Q. So it might have been a minute or two minutes more, but there was no question that it took place shortly after he left.
A. Yes.
Q. Now, you're also saying you're not sure exactly what street the motorcycle left from. Is that also correct?
A. Yes.
Q. But is it also safe to say that you had the impression it was close to the general vicinity of the house and where the tent was at?
A. Yes.
Q. It could have been maybe on the street, east or west of you, but it was someplace close to where you were at?
A. Yes.
[112] JOHN KILGORE,

witness herein, called as a witness by Plaintiff, having been first duly sworn, was examined and testified as follows:

• • • •

DIRECT EXAMINATION

BY MR. ROLFES:

Q. Would you please state your occupation?

A. My occupation is that of a criminalist for the Iowa Division of Criminal Investigation, criminalistics laboratory.

• • • •

[119] Q. What was that, sir?

A. That box contained a flashlight, two batteries and a plastic cup.

Q. Mr. Kilgore, I show you State's Exhibit 2A and ask you if you recognize this.

A. Yes, I do.

• • • •

[120] Q. What, if anything, did your examination reveal, Mr. Kilgore?

A. My examination revealed that there were three latent fingerprints suitable for examination on the exterior surface of this flashlight.

• • • •

[121] Q. Now, Mr. Kilgore, please state your conclusion.

A. My conclusions are that two of the latent impressions developed on State's Exhibit 2A were made by the same individual whose right index fingerprint is on the fingerprint card, State's Exhibit No. 5, bearing the name John Avery Coy. The third latent impression on State's Exhibit 2A was made by the same individual whose right middle fingerprint is on State's Exhibit No. 5, the fingerprint card, bearing the name John Avery Coy.

• • • •

[123] Q. Now, Mr. Kilgore, did you also attempt to make lifts on other items?

A. Yes.

Q. Specifically what, sir?

A. Two batteries and a plastic cup.

Q. Are these the same two batteries and plastic cup that you've previously testified to were in the small box marked State's Exhibit 2?

A. Yes.

Q. Mr. Kilgore, I hand you what's been marked as State's Exhibit 2C and ask if you could identify that, sir.

A. Yes, I can. This is one of the batteries that I had processed to determine if there were any suitable latent fingerprints on it.

Q. With regard to that exhibit, sir, were you able to determine whether or not there were any suitable latent fingerprints on that particular battery?

A. I was able to determine that there were no suitable latent impressions on the battery suitable for examination.

• • • •

[124] Q. I hand you what has been marked as State's Exhibit 2B for identification and would ask if you could identify that.

A. Yes. Exhibit 2B is the other battery that was included with the previously mentioned battery that I had examined. I made an examination of this battery for the presence of latent fingerprints but found no latent fingerprints suitable for identification.

• • • •

[132] PAUL J. BUSH,

witness herein, called as a witness by Plaintiff, having been first duly sworn, was examined and testified as follows:

• • • •

DIRECT EXAMINATION

BY MR. ROLFES:

Q. Mr. Bush, what is your occupation or profession?

A. My occupation is a criminalist for the Iowa Division of Criminal Investigation, State crime lab.

• • • •

[135] Q. What exhibits, sir, do you recall receiving from the City of Clinton Police Department relative to this case?

A. As far as evidence concerning this case, I received on 8-6-'85 items including bedding from a tent, hair and fingerprints from a tent, body samples from John Coy, known fingerprint cards, plastic cup and flashlight and batteries, clothing of N.C., clothing of C.B. Also, I received on 11-4-'85 an envelope containing head and pubic hairs from both N.C. and C.B. Also, on 11-6-'85 I was resubmitted or rereceived known hair samples from items that I initially talked about on evidence received 8-6-'85.

• • • •

[149] Q. Now, Mr. Bush, what was it that your tests revealed?

A. As far as these items are concerned, the three pubic hairs that were recovered from the bedding from the tent were examined and found to be similar to John Coy's known pubic hairs. They were also compared to the known pubic hairs of both C.B. and N.C. and were found to be dissimilar to their known pubic hairs. As far as the head hair that was recovered from the blue shorts, it was found to be similar to the known head hairs of John Coy. It was also compared to the known head hairs of C.B. and N.C. and found to be dissimilar from both those two individual's known head [150] hairs.

• • • •

[153] Q. Do you recall when that was, sir?

A. As far as the first items, the bedding—that was mailed back on 11-1-'85 by myself. As far as the other

evidence, the known hairs of C.B. and [154] N.C. and the hairs that were resubmitted, they were mailed back by myself on 11-7-'85 by first-class mail.

• • • •

A. Yes, that's correct. They were returned at the same time that the bedding was returned, on 11-1-'85.

MR. ROLFES: Thank you, Mr. Bush. I have no further questions.

• • • •

CROSS-EXAMINATION

BY MR. WOLFE:

• • • •

[156] Q. Now, in connection with the analysis reference is made to the fact that five hairs were recovered from the package in Exhibit B, which is identified as being an envelope containing hair and fingerprints from tent.

Was it possible to identify whose hair was similar to the hair found in that envelope?

A. As far as the five hairs that were recovered from the tent that I talked about here in Exhibit B, I only compared those to the known hairs of John Coy. I did not compare those to C.B.s' or N.C.s' known hairs.

Q. Were those hairs similar to John Coy's?

A. No, they were not.

Q. So it is not known who they may have been similar to. At least we know they were not similar to John Coy's.

A. Yes, that's correct.

• • • •

[161] J.B.,

witness herein, called as a witness by Plaintiff, having been first duly sworn, was examined and testified as follows:

• • • •

[162] DIRECT EXAMINATION

BY MR. ROLFES:

Q. Mr. B., you're the father of C.?
A. Yes.
Q. Where are you employed, sir?
A. Du Pont.
Q. Here in Clinton?
A. Yes.
Q. How long have you been employed there?
A. Twenty-one years.
Q. Mr. B., as a part of your employment with Du Pont, are you issued any types of equipment?
A. Yes; certain tools.
Q. Could you give me some examples, sir?
A. Different wrenches, flashlights, and stuff like that.
Q. Were you, as part of your employment at Du Pont's, ever issued a flashlight or flashlights?
A. Yes.
Q. Do you recall how many?
A. A couple of them.

[163] Q. These flashlights, would you describe them to me, sir?
A. Well, they're all the same: black with a little silver ring on the back end where you could hook it on to something, and a red cap.
Q. On August 2, 1985, do you recall if you had any such flashlight or flashlights in your possession?
A. Yes.
Q. How many, if you recall?
A. Two.
Q. Now, that night, August 2, 1985, your daughter and N. went out to sleep in a tent in your backyard; is that correct?
A. Yes.
Q. Do you recall whether or not they took one of your flashlights—
A. Yes.

Q. —with them?
A. Yes.
Q. And did they, sir?
A. Yes.
Q. Did you mark those flashlights in any way?
A. No.

• • • •

[164] Q. What does that Exhibit 2A look like?
A. It looks like one of my flashlights.
Q. Can you be certain?
A. Well, the front end usually gets banged on it around the rim from putting it in the tool cart.
Q. But you had basically not made any particular type of marking on your Du Pont flashlight; is that correct, sir?
A. No.

• • • •

Q. Now, when you look at that flashlight, identified as Exhibit 2A, how does that rim that you've pointed to appear to you?
A. It's damaged.
Q. And yours was also damaged?
A. Yes.
Q. Now, Mr. B., with regard to your flashlight that the girls used that night, did that have any other [165] features about it, that you can recall?
A. Well, I think it had an extra bulb in the end of it, and it didn't work when she was going to take it out. I had blue industrial batteries in it and I changed them to red industrial batteries that night that she used it.

• • • •

[168] Q. Now, Mr. B., in the early-evening hours, late afternoon on August 2, 1985, did you have occasion to be in your backyard?
A. Yes.
Q. Was your daughter C. in your backyard?
A. Yes.

Q. What was she doing?
A. She was building a tent.
[169] Q. Do you recall seeing anyone else?
A. Yes.
Q. Who?
A. John Coy.
Q. About when was this?
A. Around 6 in the evening.
Q. Where?
A. Sitting in the Bingham backyard back by the garden in a lounge chair, facing the house, where he's never sat before.
Q. Facing which house, sir?
A. Straight up toward the Bingham house.
Q. Did you have occasion at about this time to be in the neighborhood or in close proximity to your daughter's tent?
A. Yes. We were going out to pick tomatoes around that time, and as we walked out to the garden, he just got up and left the chair and went up to the house.
Q. Was C. outside at that time?
A. Yes.
Q. From the area of the tent, were you able to observe Mr. Coy in the Bingham backyard?
A. Yes.
Q. Was there anything obstructing the view?
A. No.
[170] Q. Mr. B., I show you what has been marked as State's Exhibit No. 13 for identification and ask you if you recognize that.
A. Yes.
Q. What is it a picture of?
A. It's part of the Bingham's privacy fence and the chain link fence, with a gate, going into their backyard. It also shows the lounge chair down by the garden.

• • • •

[175] Q. Mr. B., I show you what's been marked as State's Exhibit 19 for identification and ask you if you recognize that.
A. Yes.
Q. What is that a picture of, sir?
A. It's taken from another angle from behind the garden showing the house. If you look at this closely, if you was back here coming through the yard or something, you don't really notice the tent from this distance.

• • • •

[177] Q. Now, Mr. B., on August 3, 1985 after you became aware of what had occurred, had you gone outside, sir?
A. I just looked out the back door. I didn't go near the tent.
Q. Did you have occasion to see in the area of the Bingham residence?
A. Yes.
Q. Particularly in the area of the gate?
A. Yes.
Q. Now, that picture would be State's Exhibit 13. What, if anything, did you notice about that gate, sir?
A. From my back porch I could see over my patio and I could see the gate. It was open.
Q. Mr. B., I show you what has been marked as State's Exhibit 2D for identification and would ask if you can recognize this.
A. Yes.
Q. Would you please describe what this is?
A. That's a yellow plastic cup.
[178] Q. Did you and your wife have these in your house?
A. Yes.
Q. With regard to C. and N., did they have any?
A. Yes.
Q. What did they do with them, sir?

A. They took them out to the tent that night with them.

Q. How many?

A. Two.

Q. Were there two there the next morning?

A. No.

Q. Was your flashlight there the next morning, sir?

A. No.

* * * *

[181] (Whereupon, the following in-camera proceedings were had, commencing at 9 a.m., on November 15, 1985.)

THE COURT: State of Iowa versus Coy. The defendant is present; his counsel, Mr. Wolfe, is present; Mr. Rolfes, the assistant county attorney, is present. We're out of the hearing and presence of the jury, in open court.

Mr. Wolfe.

MR. WOLFE: Your Honor, yesterday I objected to the use of a screen that was placed between the defense table and the witness limiting the view of the witness to the defense table. A limited view was available by the defendant observing the witness through a clouded screen. At that time, on various grounds, which are a matter of record, I objected to the use of the screen. The court overruled the motion. I would again make the same motion, the testimony having taken place with the screen being present. I would additionally move for a mistrial on the grounds that it is impossible to cure the prejudice and damage done to the defendant's case by the use of the screen.

THE COURT: The defendant's motion for mistrial is overruled.

* * * *

[193] DAVID SPEAKMAN,

witness herein, called as a witness by Plaintiff, having been first duly sworn, was examined and testified as follows:

* * * *

DIRECT EXAMINATION

BY MR. ROLFES:

Q. Sergeant Speakman, how long have you been employed with the City of Clinton Police Department?

A. About 18 years.

* * * *

[194] Q. Did you have occasion to become involved in an investigation relative to this case?

A. Yes, sir. When I came in at 7 o'clock I was told there had been an assault on two young girls and that the girls were at Mercy Hospital. I was told where the assault had taken place.

Q. What, if anything, did you do next?

A. I called Sergeant Smith. He was the acting Detective-Bureau captain and as such my immediate superior. He was off duty for the weekend but on call for emergencies. I called him because there were split [195] duties, two things that needed to be done, and only one of me. The interviews at the hospital had to be done and the crime scene had to be processed. I called Sergeant Smith and asked him if he would handle the crime scene and then I went to Mercy to interview the two girls.

* * * *

[196] A. What time was it that we moved to the B.s' home?

Q. Yes, sir.

A. Shortly after 9 o'clock in the morning.

Q. What did you proceed to do there?

A. Well, several things. The interview with C.B. was undertaken at the B.s' home. Prior to that we had all—by "we" I mean the B. family—I think some of the neighbors were around—and I had looked around the yard. I had not yet seen the crime [197] scene and wanted to look at it. I was in the backyard when Mr. B. told me that the neighbor was heading down the sidewalk.

Q. Who was that, sir?

A. The neighbor that he pointed to was later identified by me as Mr. Coy, the defendant here.

Q. What, if anything, did you do then?

A. I went to my squad car and radioed for assistance, and then drove down to the corner about half a block south of the B.s' home and stopped Mr. Coy.

Q. Approximately what time would that have been, sir?

A. Shortly before 10 o'clock.

Q. What, if anything, did you observe when you stopped Mr. Coy?

A. His general appearance—as to specifics about his general appearance, he appeared to be normally clothed for that day. He was—had a knapsack—a small knapsack on his back, and he was carrying a black case, a hard plastic case, like a suitcase.

Q. Officer, did you observe anything about his appearance which was out of the ordinary?

A. He was wearing a watch in an unusual way.

Q. Would you describe that, sir?

A. He had the watch pushed way up his forearm, and the watch was turned with the face towards the inside of [198] the arm instead of the more usual, towards the outside.

Q. Did you have occasion on August 3, 1985 to execute a search warrant?

A. Yes, sir.

Q. Where was that, sir?

A. That was at the residence where we were informed Mr. Coy was living. The address is 1625 Ninth Street Northwest.

* * * *

Q. Would you please describe your search of the Bingham residence.

A. Well, we searched the entire home, every room there, from top to bottom as best we could. We routinely on searches like this where—there was nobody home. We were the only two people in the house. We usually split up and cover a room at a time, and then the other officer will cover that room at a later time so that we get double coverage on rooms.

[199] Q. What, if anything, did you find in your search of this residence?

A. Well, we found many things. The things that we found that were listed in the search warrant and which were in line with this case were a flashlight—we found a black-and-red flashlight, two batteries, a plastic cup.

* * * *

[201] Q. Now, officer, with regard to this cup, where exactly was it that you found this?

A. Just inside the back door of the Bingham residence where Mr. Coy was living. This would be the kitchen. It's a door from the backyard. You climb some stairs and there's a door. When you get in the door there's a kitchen, and just inside the kitchen door is a trash can. The cup was found in that trash can.

Q. During your search of the Bingham home, were you able to locate any other cups similar to or like the cup [202] that has been marked as State's Exhibit 2D?

A. No, sir.

Q. Did you look for other cups similar to that?

A. Yes, we did.

Q. How would you describe your search of that residence?

A. Exhaustive. We went through the place several times.

Q. You were not able to locate any other cups of that nature; is that correct?

A. That's correct.

* * * *

[207] CROSS-EXAMINATION

BY MR. WOLFE:

* * * *

Q. In connection with the interviews, did the young [208] women give a description of their assailant?

A. Yes, sir, they did.

Q. Did either or both make reference to him having a ponytail?

A. Both of them did, yes, sir.

Q. Do you recall from your records approximately what type of length they were talking about?

A. Length?

Q. Yes.

A. Three to four inches is what I recall.

Q. Now, was there anything else—three to four inches below something? Did they make reference to any type of mask?

A. Yes, sir.

* * * *

[209] Q. Now, reference was made to a watch that John Coy was wearing that morning.

A. Yes, sir.

Q. Do you recall if that was a digital watch?

A. No, I don't recall for sure. My best recollection was that it was, but I don't recall for sure.

* * * *

[212] Q. Did you make a thorough search for those?

A. Yes, sir.

Q. Did you find them?

A. None that we felt compared, no, sir.

Q. Now, you were also looking for dark blue trousers with a white stripe down each side. Was that based upon a description given you of what the assailant was wearing?

A. Yes, sir.

Q. Did you make a thorough search for those?

A. Yes, sir.

Q. Did you find them?

A. No, sir.

Q. You were also looking for a green-cloth mask with cutouts for eyes, mouth and nose.

A. Yes, sir.

Q. Did you find anything that appeared to be in line with that?

A. No, sir.

* * * *

[213] LYLE SMITH,

witness herein, called as a witness by Plaintiff, having been first duly sworn, was examined and testified as follows:

* * * *

[214] DIRECT EXAMINATION

BY MR. ROLFES:

Q. Sergeant Smith, how long have you been with the Clinton Police Department?

A. Nineteen years.

* * * *

[230] Q. Officer, in your investigation of the crime scene of the B. residence, you had occasion to view this makeshift tent; is that correct?

A. Yes, sir.

Q. And the general area of the neighborhood; is that correct?

A. Yes.

Q. Is that tent visible from the front of the [231] B. home?

A. No, it's not.

Q. Is it visible from the neighbors in back of the B. home?

A. I believe it would be very difficult for anyone from the rear of the B. residence to see that tent.

• • • •

CROSS-EXAMINATION

BY MR. WOLFE:

• • • •

[235] Q. Now, were you able to account for the motorcycle after carrying out the canvass of the neighborhood?

A. No.

• • • •

[236] Q. Now, as I understand it from Detective Speakman, you also were looking for two girls' panties based upon what the young women said were taken from them; is that correct?

A. Yes, sir.

Q. Did you make a thorough search for those panties?

A. I believe so.

Q. Did you have any luck in finding them?

A. No, sir.

Q. There was also mention made to a pair of white (sic) trousers with white piping on the side. Did you look for those?

A. They were blue with white stripes—

Q. I'm sorry.

[237] A. —but, yes, we looked for them and didn't find them.

Q. I think there was also reference made to a green mask with holes cut out for the eyes and the nose and the mouth.

A. Yes.

Q. Did you look carefully for anything that would seem to match that?

A. Yes, we did.

Q. Now, that was based upon what, one of the young women saying the assailant was wearing such a mask?

A. Yes, sir.

Q. Did you have any luck in finding that mask?

A. No.

• • • •

[295] (Whereupon, the following in-camera proceedings were had, commencing at 9:30 a.m., on November 18, 1985.)

• • • •

[296] We are in chambers; the defendant's present; his counsel, Mr. Wolfe is present; the assistant county attorney is present; the press is present. The State has rested. We are out of the hearing of the jury, we are out of the presence of the jury.

Does the defense wish to address the court?

MR. WOLFE: Yes, your Honor. At the close of the State's evidence we would move the court to order a judgment of acquittal. We would do this on the grounds that the State has failed to introduce evidence that would support a finding by the jury that the defendant is guilty as charged. Additionally, and in the alternative, we would renew our objection to the use of the screen device that was in the courtroom during the testimony of N.C. and C.B., and we, at this time, would renew our motion for a mistrial based upon grounds previously stated. With that we would submit the motions, your Honor.

THE COURT: The Motion for Directed Verdict of Acquittal is overruled and denied. The Motion for Mistrial is overruled and denied. • • •

• • • • •

[297] SHERRILL WOHLSTADTER,

witness herein, called as a witness by Defendant, having been first duly sworn, was examined and testified as follows:

• • • •

[299] Q. Now, based on your acquaintanceship with John, have you ever noticed him wearing a hairstyle involving either a ponytail or a short braid, or anything of that sort?

A. He's never had his hair that long.

Q. So you've never noticed that kind of hairstyle?

A. No.

Q. Also, are you familiar with the type of watch that he wore?

A. Yes, I am.

Q. How did you happen to notice—

A. Okay. Well, we were playing an engagement at Molly Murphy's, which used to be the Shot Tower, and we were setting up equipment, and we had everything already, and it was about 15 minutes before we were ready to go on—and I don't wear a watch—and this is just kind of a freak incident—but I asked John—I said, "Well, you know, now that I've got all this equipment set up I forgot my guitar. How much time do I have to run home and get it before we play?" and he said, "Well"—he checked his watch and that's when I noticed it was a digital. I looked at it and I said, "Oh God, I've only got 10, 15 minutes."

[302] KAREN BINGHAM,

witness herein, called as a witness by Defendant, having been first duly sworn, was examined and testified as follows:

• • • •

[304] Now, during the period of time that you knew John, from April up until the last time you saw him, how would you describe his haircut?

A. Conservative. Typical conservative haircut.

Q. Did you ever notice him to wear some type of ponytail or some type of braid in his hair?

A. Never.

Q. Do you think it would have been possible, due to the length of his hair?

[305] A. No. His hair is much too short or too fine.

Q. Now, what kind of a watch did he have?

A. He had a digital watch, black, plastic digital watch.

Q. Was it an expensive watch?

A. No, a fairly cheap watch.

Q. Did that have numbers similar to the clock up there.

A. No, it had digital numbers.

• • • •

[306] Q. Are you aware of the fact that one of the things that was being looked for was blue trousers with white piping?

A. Yes.

Q. Did you make an effort to discover whether or not there were any blue trousers with white piping in your residence?

A. Yes, I did.

Q. Did you find any?

A. No.

Q. Did you make a thorough search?

A. Very.

Q. Were there also some girls' panties listed?

A. Uh-huh, yes.

Q. Now, would these panties have been different than those worn by your daughter?

A. The search warrant said that the panties that were looked for were size 12, and most of my daughter's were size 10. And, again, I looked very thoroughly. I didn't find any such items.

Q. Did you find anything that would appear to have been the makings of some type of a mask?

A. No, sir.

• • • •

[307] Q. Did you ever see John riding a motorcycle here in Clinton?

A. Never.

• • • •

[309] JOHN AVERY COY,

witness herein, called as a witness by Defendant, having been first duly sworn, was examined and testified as follows:

• • • •

[314] Q. Do you recall what kind of a haircut you had at that time?

A. It was basically what I have now but a little shorter.

Q. Do you recall what kind of a watch you had?

A. Yes, I do.

Q. What kind was that?

A. It was a digital, one of those—I don't think they're more than four or five dollars at K Mart.

Q. Now, is that similar to the watch you're wearing at the present time?

A. Yes, it is, very similar.

Q. How tall are you?

A. Six-foot-three.

Q. Do you have a pair of blue trousers with white piping?

A. No, I don't.

Q. John, during the early-morning hours of Saturday morning, which I think is August 3, did you go into a tent on the Bingham (sic) property?

A. A tent on the "Bingham" property?

[315] Q. Right—pardon me—on the B. property.

A. No, I did not.

Q. Did you in any way molest or have any contact with two 13-year-old girls that evening?

A. No, sir, I did not.

Q. Do you have any knowledge regarding a mask that may have been worn by someone in that vicinity?

A. No, I don't.

Q. Have you ever ridden a motorcycle while you've been here in Clinton?

A. No, I haven't.

Q. Do you have any close friends who own motorcycles?

A. Not a single one.

• • • •

Q. John, that morning when you got up, was there some action you took regarding the mail? I'm talking now about Saturday morning.

A. Yes, there was.

Q. What was that?

A. I didn't collect the mail every day, as I hardly ever got any mail myself there. I went out to check the mail, and I brought the mail in.

Q. Now, did you notice anything in the way of debris or garbage or anything that appeared to be—

[316] A. Yes, I did.

Q. Could you explain to the jury what that was?

A. There was a—the plastic cup that's been shown as evidence here was in my driveway, and also, there was a flashlight on the corner of the driveway just outside of the garage door.

Q. Was there any other garbage that you picked up when you went out there?

A. It was like a cupcake wrapper, a plastic wrapper. There was something else. I don't recall if it was a stick or what it was, but something else that I did pick up.

Q. Now, dealing with the debris—by that I mean the cup, the paper and the other thing—do you recall what you did with that junk?

A. The flashlight was just outside of the garage door, as I stated, and there were tools on the floor not three feet away from there that were inside the garage. It

appeared that the flashlight had been kicked out, and I wondered if maybe the batteries had corroded. I didn't know how long it had been out there. I took the top off of the flashlight and removed the batteries—I tried the flashlight first and it didn't work. I set the flashlight on the shelf just inside the door and, to the best of my knowledge, I thought I threw the cup in the [317] garbage there, but apparently I had taken the stuff upstairs and threw it in the garbage.

• • • •

IN THE SUPREME COURT OF IOWA

No. 85-1842

STATE OF IOWA,

Appellee,

v.

JOHN AVERY COY,

Appellant.

Filed: December 17, 1986
Rehearing Denied: January 16, 1987

APPEAL FROM THE IOWA DISTRICT COURT
FOR CLINTON COUNTY

Considered by REYNOLDSON, C.J., and HARRIS, SCHULTZ, LAVORATO, AND NEUMAN, J.J.

REYNOLDSON, Chief Justice

After jury trial John Avery Coy was convicted of two counts of engaging in lascivious acts with a child in violation of Iowa Code section 709.8(1) (1985). In this appeal he challenges two trial court rulings. Finding no error, we affirm.

In the early morning hours of August 3, 1985, two young girls, spending the night in a makeshift tent located in the backyard of one of their homes, were

sexually assaulted. Suspicion early focused on Coy who at that time lived next to the home where the girls were staying. Following a search of his home, Coy was charged and tried.

On appeal Coy challenges trial court's failure to suppress certain items of evidence he claims were obtained in violation of his fourth amendment right to be free from unreasonable searches and seizures. Coy's second alleged error focuses on the use at trial of a screen that allowed him to see and hear the victims testify but prevented them from seeing him. He contends this violated his sixth amendment right to confront witnesses as well as his fourteenth amendment right to a fair trial. We first address Coy's fourth amendment claim.

I. Before trial, Coy moved to suppress evidence seized during the search of his residence. While this evidence was seized under warrant, Coy asserted a portion of the information used to demonstrate probable cause for issuing the warrant was itself obtained in violation of his fourth amendment rights. Specifically, Coy contended two private citizens, acting as agents of the police, illegally entered and searched his residence. These individuals reported their findings to police who used this information to establish the probable cause necessary to obtain a search warrant.

Following a pretrial hearing, trial court denied the suppression motion, finding the challenged search was private in nature and thus beyond the scope of any fourth amendment prohibition.

The legal principles governing Coy's contentions are well established. The fourth amendment, made applicable to the states by operation of the due process clause of the fourteenth amendment, *Mapp v. Ohio*, 367 U.S. 643, 654-57, 81 S. Ct. 1684, 1691-92, 6 L. Ed. 2d 1081, 1089-91 (1961), proscribes certain governmental action in searches and seizures. The mandates of the fourth amendment, however, are "wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by

a private individual not acting as an agent [or instrument] of the Government or with the participation or knowledge of any governmental official.'" *United States v. Jacobsen*, 466 U.S. 109, 113-14, 104 S. Ct. 1652, 1656, 80 L. Ed. 2d 85, 94 (1984) (quoting *Walter v. United States*, 447 U.S. 649, 662, 100 S. Ct. 2395, 2404, 65 L. Ed. 2d 410, 421 (1980) (Blackmun, J., dissenting)); *see also State v. Flynn*, 360 N.W.2d 762, 767 (Iowa 1985); *State v. Bakker*, 262 N.W.2d 538, 546 (Iowa 1978).

Whether a private citizen has become an agent or instrument of the state depends on the total circumstances surrounding the challenged conduct. *Coolidge v. New Hampshire*, 403 U.S. 443, 487, 91 S. Ct. 2022, 2049, 29 L. Ed. 2d 564, 595 (1971). Factors variously considered and weighed by courts include: (1) whether the state directly or indirectly encouraged or participated in the challenged conduct; (2) whether the state, although knowing the challenged conduct was occurring or was likely to occur, did nothing to prevent it; (3) whether the challenged conduct was intended to assist law enforcement officials or to further some other end; and (4) whether law enforcement officials themselves could have undertaken the conduct without violating the defendant's fourth amendment rights. *See id.*; *United States v. Walsh*, 791 F.2d 811, 814 (10th Cir. 1986); *United States v. Ford*, 765 F.2d 1088, 1090 (11th Cir. 1985) (per curiam); *United States v. Miller*, 688 F.2d 652, 657 (9th Cir. 1982); *People v. North*, 29 Cal. 3d 509, 514, 629 P.2d 19, 22, 174 Cal. Rptr, 511, 514 (1981).

At bottom, a private search, untainted by improper governmental involvement, implicates no fourth amendment interest regardless whether the search was accidental or deliberate, reasonable or unreasonable, and regardless whether the search may itself give rise to civil or criminal liability. *See Jacobsen*, 466 U.S. at 115, 104 S. Ct. at 1657, 80 L. Ed. 2d at 95; *Burdeau v. Mc-*

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Dowell, 256 U.S. 465, 475, 41 S. Ct. 574, 576, 65 L. Ed. 1048, 1051 (1921); *State v. Holliday*, 169 N.W.2d 768, 771 (Iowa 1969).

Our review of trial court's ruling on Coy's suppression motion, involving as it does a claimed constitutional violation, requires an independent, de novo evaluation of the total circumstances shown by the record. *State v. Baldwin*, —— N.W.2d ——, —— (Iowa 1986); *State v. Campbell*, 326 N.W.2d 350, 352 (Iowa 1982).

The facts surrounding the challenged search are largely undisputed. The girls reported the attack at approximately 6 a.m. on the morning of August 3, 1985. They were taken immediately to a nearby hospital where they were examined and one of the girls was interviewed by police Sergeant Speakman. Between 8:30 and 9 a.m., Speakman, the second girl, and her parents returned home to the scene of the sexual assault.

While discussing the incident with the girl and her parents, the father of the girl suggested Coy as a possible suspect. The father's suspicions appear to have been based largely on the girls' statements coupled with his own observations of Coy the day before the attack. Coy soon was observed leaving his residence with a suitcase.

Sergeant Speakman approached Coy and spoke with him about the incident. While Speakman was talking with Coy, a computer check disclosed an outstanding arrest warrant for Coy, based on a traffic violation. Coy was arrested and taken into police custody. Speakman then returned to the girl's home and continued interviewing her.

Approximately an hour later and while the girl was still being interviewed, her father and another neighbor told Speakman they had just completed a search of Coy's residence. They reoprted finding a yellow cup like one the assailant had taken from the girls' tent. Sergeant Speakman later testified he was "pleasantly surprised" by this information.

On the strength of this and other information, Speakman applied for and obtained a search warrant for Coy's residence. The search warrant was executed, and evidence later admitted against Coy was discovered and seized. This evidence included the yellow cup, a flashlight, and flashlight batteries, all of which matched the description of equipment taken from the victims.

In challenging trial court's ruling, Coy contends the evidence should have been suppressed because in entering his residence the girl's father and the neighbor were acting as agents of the police. Coy argues his initial arrest on the outstanding warrant was but a ploy used to get him out of the way. Then, once he was in custody, police encouraged or simply stood by while the illegal search took place.

In taking this position Coy relies heavily on Sergeant Speakman's testimony he was pleasantly surprised by the news of the discovery. Coy also emphasizes evidence showing the neighbor who accompanied the girl's father during the house search had earlier been requested by police officers to assist them in a search of the neighborhood yards.

The officers, when earlier investigating the crime, were questioned by the neighbor as they walked through his backyard. The officers explained they were conducting a general yard search for clothing worn by the attacker and a yellow drinking cup, a flashlight, and apparel taken from the girls.

The officers asked the neighbor to walk around the neighborhood to see if he could find any of these items. The neighbor walked through yards for several blocks unsuccessfully looking for the evidence. Following this search, the neighbor and the girl's father entered and searched Coy's residence.

At the suppression hearing, Sergeant Speakman and another officer testified without contradiction they had no idea the father and the neighbor were going to search Coy's residence and had not encouraged them to do so.

The father and neighbor testified they acted wholly on their own and no officer specifically or by implication suggested they enter Coy's residence.

Additionally, Coy has never contended the outstanding warrant on which he originally was detained was trumped up or somehow manufactured. Once Sergeant Speakman learned of the warrant's existence it was his duty to place Coy under arrest. Finally, that Speakman was pleasantly surprised by the discovery of evidence shows nothing more than a natural reaction to unexpected good news.

We conclude no impermissible agency relationship was present in this case. Trial court properly denied Coy's motion to suppress the evidence seized from his residence.

II. We turn now to Coy's second claimed error. Trial court granted State's request that a screen be placed in front of Coy during the two girls' testimony. This screen allowed Coy to see the girls and hear their testimony but prevented them from seeing him.

Coy challenges the use of this screening device on two grounds. He claims a violation of his constitutional right to confront the witnesses against him. Coy additionally asserts the screen created a strong and prejudicial inference of guilt, violating his right to a fair trial. Again reviewing both constitutional claims de novo, we reject Coy's contentions. *See State v. Nelson*, 390 N.W.2d 589, 591 (Iowa 1986); *State v. Holland*, 389 N.W.2d 375, 378 (Iowa 1986).

Use of the screening device was authorized by a recently enacted Iowa statute that in relevant part provides:

> The court may require a party be confined to an adjacent room or behind a screen or mirror that permits the party to see and hear the child during the child's testimony, but does not allow the child to see or hear the party.

Iowa Code § 910A.3(1) (Supp. 1985). The statute also requires a court authorizing a screening device "to insure that the [defendant] and counsel can confer during testimony and [to] inform the child that the [defendant] can see and hear the child during testimony." *Id.* Use of such a device is limited to children under age fourteen. *Id.*

In challenging trial court's authorization of the screening device, Coy makes no assertion trial court failed to comply with the explicit terms of Iowa Code section 910A.3(1). Rather, Coy argues trial court, although not statutorily required to do so, was constitutionally required to find the screen was necessary before allowing it to be used. Because we conclude the express requirements of section 910A.3(1) fully protect Coy's confrontation right, we hold trial court had no obligation to make an independent finding of necessity.

The sixth amendment states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." U.S. Const. amend. VI. The right secured to criminal defendants by this amendment is applicable to the states by operation of the fourteenth amendment. *Pointer v. Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 1068, 13 L. Ed. 2d 923, 926 (1965).

The confrontation right serves several basic purposes. Contrary to Coy's arguments, confrontation is "not [guaranteed] for the idle purpose of [allowing a defendant to] gaze [] upon the witness or of being gazed upon by [her]." *State v. Strabel*, 313 N.W.2d 497, 500 (Iowa 1981) (quoting *Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347, 353 (1974)). Primarily, confrontation is guaranteed "for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers." *Id. See also Lee v. Illinois*, —— U.S. ——, ——, 106 S. Ct. 2056, 2062, 90 L. Ed. 2d 514, 525-26 (1986); *Delaware v. Van Arsdall*, —— U.S. ——, ——, 106 S. Ct. 1431, 1435, 89 L. Ed. 2d 674, 682-83

(1986); *Holland*, 389 N.W.2d at 378-79; *State v. Davis*, 269 N.W.2d 434, 438 (Iowa 1978).

As a secondary (and at times dispensable) purpose, the right of confrontation enables:

> [T]he *judge* and the *jury* . . . to obtain the elusive and incommunicable evidence of a *witness' deportment while testifying*, and a certain subjective moral effect is produced upon the witness. . . . This secondary advantage, however, *does not arise from the confrontation of the opponent and the witness; it is not the consequence of those two being brought face to face.* It is the witness' presence before the *tribunal* that secures the secondary advantage. . . .

Strabel, 313 N.W.2d at 500 (emphasis in original and emphasis added) (quoting 5 J. Wigmore, *Evidence*, § 1395, at 153-54 (Chadbourn rev. 1974)); *see also Ohio v. Roberts*, 448 U.S. 56, 69, 100 S. Ct. 2531, 2538, 65 L. Ed. 2d 597, 606 (1980); *Lee*, —— U.S. at ——, 106 S. Ct. at 2062, 90 L. Ed. 2d at 526; *Holland*, 389 N.W. 2d at 379; *State v. Froning*, 328 N.W.2d 333, 336 (Iowa 1982); *State v. Castillo*, 315 N.W.2d 63, 66 (Iowa 1982).

An additional function served by confrontation was recently reiterated by the Supreme Court in *Illinois v. Lee*. There, the Court noted confrontation " 'insures that the witness will give his [or her] statements under oath —thus impressing him [or her] with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury.' " —— U.S. at ——, 106 S. Ct. at 2062, 90 L. Ed. 2d at 526 (quoting *California v. Green*, 399 U.S. 149, 158, 90 S. Ct. 1930, 1935, 26 L. Ed. 2d 489, 497 (1970)).

In this case all three of the above purposes were fulfilled. First, Coy's attorney cross-examined both girls fully and without limitation. Second, the girls' testimony, both direct and cross-examination, occurred in court and in full view of the judge and jury, who thus were able to observe their demeanor and determine the

credibility of their testimony. Third, both girls testified under oath. Before they testified trial court carefully insured they understood the oath and were aware of their moral and legal obligation to tell the truth. It is noteworthy although not constitutionally significant that Coy was able to see and hear the girls, and, while they could not see him, they were made aware he was there.

Under these circumstances, we conclude Coy's right of confrontation was not infringed. Our conclusion was foreshadowed by *State v. Strabel*, in which we determined trial court's decision to permit a blackboard to separate a sexual abuse victim from the defendant during the victim's testimony, even if error, did not compromise defendant's right of confrontation and thus was harmless beyond the reasonable doubt. 313 N.W.2d at 501.

In reaching this conclusion, we reject Coy's contention trial court could not constitutionally permit the screen authorized by Iowa Code section 910A.3(1) absent a showing of necessity. In the confrontation clause context, the issue of necessity arises when a witness is unavailable for trial and a party seeks to introduce some prior statement or testimony of that witness. *See Roberts*, 448 U.S. at 65, 100 S. Ct. at 2538, 65 L. Ed 2d at 607; *Barber v. Page*, 390 U.S. 719, 722, 88 S. Ct. 1318, 1320, 20 L. Ed. 2d 255, 258 (1968); *State v. Zaehringer*, 325 N.W.2d 754, 759 (Iowa 1982); *Castillo*, 315 N.W.2d at 66. Here, both girls were present at trial and testified under oath.

III. We turn finally to Coy's assertion trial court's ruling allowing use of the screening device impermissibly prejudiced his right to a fair trial in violation of the fourteenth amendment. Coy argues utilization of this device during the girls' testimony created the same inference of guilt as can prison garb, or the use of handcuffs or leg irons. *See Estelle v. Williams*, 425 U.S. 501, 512-13, 96 S. Ct. 1691, 1697, 48 L. Ed. 2d 126, 135 (1976); *Illinois v. Allen*, 397 U.S. 337, 344, 90 S. Ct.

1057, 1061, 25 L. Ed. 2d 353, 359 (1970); *State v. Ellis*, 350 N.W.2d 178, 183 (Iowa 1984); *State v. Evans*, 169 N.W.2d 200, 210-11 (Iowa 1969). The Supreme Court addressed this issue in *Holbrook v. Flynn*, where defendant claimed prejudice in the deployment of four uniformed and armed state troopers in the courtroom during his trial. —— U.S. ——, ——, 106 S. Ct. 1340, 1346, 89 L. Ed. 2d 525, 534 (1986).

In analyzing defendant's claim, the Supreme Court recognized certain actions may be so inherently prejudicial they will only be permitted if justified by an essential state interest. *Id.* The Supreme Court also made clear, however, that when a challenged activity is not inherently prejudicial, defendant's right to a fair trial is not adversely affected absent a showing of actual prejudice to the defendant. *Id.* at ——, 106 S. Ct. at 1348, 89 L. Ed. 2d at 537. The basic inquiry, of course, must be whether a particular practice is inherently prejudicial, as Coy claims in this case.

A practice is inherently prejudicial if in a particular case it is likely to compromise defendant's constitutional right " 'to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.' " *Id.* at ——, 106 S. Ct. at 1345, 89 L. Ed. 2d at 533 (quoting *Taylor v. Kentucky*, 436 U.S. 478, 485, 98 S. Ct. 1930, 1934, 56 L. Ed. 2d 468, 475 (1978)). If a practice gives rise to an unmistakable brand of guilt or creates an unacceptable risk the jury may consciously or subconsciously be influenced in their deliberations, the practice is inherently prejudicial. *Id.* at ——, 106 S. Ct. at 1347, 89 L. Ed. 2d at 535-36. Because inherently prejudicial practices may influence a jury subconsciously, a court cannot always assume cautionary instructions will be sufficient to prevent prejudice.

Here, the screening device was used only during testimony of the two children. The jury, already aware of

the charges and their embarrassing nature, likely concluded the screen was being used to reduce the trauma necessarily attendant to the children's testimony. Trial court encouraged this assumption by explaining to the jury the device was simply something used in procedures involving children. Further, unlike the presence of prison garb, or gags or restraining devices, the limited use of the screen did not tend to brand Coy as guilty. We hold use of the screen was not inherently prejudicial in the circumstances of this trial.

Because use of the screen was not inherently prejudicial, a reversal would require Coy to show actual prejudice. Coy, however, has not made such a showing. His contention the use of the screen denied him his right to a fair trial is without merit.

We affirm the district court judgment.

AFFIRMED.

IN THE SUPREME COURT OF IOWA

No 85-1842

STATE OF IOWA,
Appellee,

vs.

JOHN AVERY COY,
Appellant.

ORDER

After consideration by the court en banc, appellant's petition for rehearing in the above-captioned case is hereby overruled and denied.

Done this 16th day of January, 1987.

THE SUPREME COURT OF IOWA

By W. W. REYNOLDSON, Chief Justice

IN THE SUPREME COURT OF IOWA

Supreme Court No. 85-1842

STATE OF IOWA,
Appellee,

vs.

JOHN AVERY COY,
Appellant.

STIPULATION RE CORRECTION OR MODIFICATION OF THE RECORD

Filed March 31, 1987

COMES NOW Plaintiff-Appellee, State of Iowa, through counsel, and Defendant-Appellant, John Avery Coy, through counsel, and pursuant to Iowa Rule of Appellate Procedure 10(d) stipulate and agree as follows:

1. A significant issue on appeal of this case involved the constitutionality of a one-day screening device that separated the defendant from two complaining witnesses during their testimony in open court.

2. By error or accident a photograph of that one-way screening device was never made a part of the trial court or appellate record in this case. Said photograph would be material to the issues presented by this appeal.

3. A photograph of the one-way screening device used in the trial of *State v. John Avery Coy* is attached hereto. Said photograph fairly and accurately depicts the one-way screening device as employed during the trial of John Avery Coy.

4. Said photograph and this affidavit may be part of a supplemental record to the Iowa Supreme Court in Case No. 85-1842.

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SUPREME COURT OF THE UNITED STATES

No. 86-6757

JOHN AVERY COY,
Appellant

v.

IOWA

ON APPEAL FROM THE
SUPREME COURT OF IOWA

ON CONSIDERATION of the motion for leave to proceed *in forma pauperis* it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted.

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted.

June 26, 1987

APPELLANT'S

BRIEF

Supreme Court, U.S.
FILED
SEP 8 1987
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(6)

No. 86-6757

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOHN AVERY COY,

Appellant,

v.

STATE OF IOWA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF IOWA
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QUESTIONS PRESENTED

Whether a state statute that permits the placement of a one-way screening device between a criminal defendant and complaining witnesses at a jury trial, over objection and without establishing an essential state interest or considering less prejudicial alternatives, violates the right to a fair trial guaranteed by the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

Whether a state statute that permits the placement of a one-way screening device between a criminal defendant and complaining witnesses at a jury trial, over objection and without a showing of necessity, violates the Confrontation Clause of the Sixth Amendment of the Constitution of the United States.

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CONSTITUTION

Sixth Amendment, U.S. Constitution	*passim*
Fourteenth Amendment, U.S. Constitution	*passim*

OPINION BELOW

The opinion of the Supreme Court of Iowa (J.A. 69-79) is reported at 397 N.W.2d 730 (Iowa 1986).

JURISDICTION

The judgment of the Supreme Court of Iowa, affirming appellant's conviction, was entered on December 17, 1986 (J.A. 69-79). A Motion for Rehearing was filed and denied on January 16, 1987 (J.A. 80). A Notice of Appeal to this Court was timely filed in the Supreme Court of Iowa on March 6, 1987 (J.S. App. 13a). The Jurisdictional Statement was filed on April 15, 1987 and probable jurisdiction was noted on June 26, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

STATEMENT

This is an appeal from the final judgment of the Supreme Court of Iowa holding that application of Iowa Code section 910A.3[1] to permit the placement at a jury

---

[1] Iowa Code section 910A.3 was transferred in the 1987 Iowa Code to section 910A.14. Act of May 5, 1986, ch. 1178, § 19, 1986 Iowa Acts 246. Section 910A.3 (Supp. 1985) reads as follows:

> 1. A court may, upon its own motion or upon motion of any party, order that the testimony of a child, as defined in section 702.5, be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court. Only the judge, parties, counsel, persons necessary to operate the equipment, and any person whose presence, in the opinion of the court, would contribute to the welfare and well-being of the child may be present in the room with the child during the child's testimony.
>
> The court may require a party be confined to an adjacent room or behind a screen or mirror that permits the party to see and hear the child during the child's testimony, but does not allow the child to see or hear the party. However, if a party is so confined, the court shall take measures to insure that the party and counsel can confer during the testimony and shall inform the

trial of a one-way screening barrier[2] between appellant and two complaining witnesses did not violate appellant's right to a fair trial or to confront witnesses against him guaranteed by the fourteenth and sixth amendments to the Constitution of the United States.

In the early morning of August 3, 1985, two thirteen year old girls[3] were sexually molested by a man who entered the makeshift tent where they had been sleeping. The tent was located in the backyard of the home where one of the girls lived and next door to the house where appellant resided. Neither girl ever identified appellant as her assailant (J.A. 7, 14, 20, 32).[4]

---

child that the party can see and hear the child during testimony.

2. The court may upon motion of a party order that the testimony of a child, as defined in section 702.5, be taken by recorded deposition for use at trial, pursuant to rule of criminal procedure 12(2)(b).

3. The court may upon motion of a party admit into evidence the recorded statements of a child, as defined in section 702.5, describing sexual contact performed with or on the child, not otherwise admissible in evidence by statute or court rule if the court determines that the recorded statements substantially comport with the requirements for admission under Iowa rules of evidence 803(24) or 804(5).

[2] Attached to appellant's brief as Appendix A are a diagram of the Clinton County courtroom where appellant's trial was held and four photographs of the one-way screening device in that courtroom. This demonstrative evidence was not part of the trial court record and was not included in the record on appeal to the Iowa Supreme Court. It is included with appellant's brief as an illustrative aid to this Court's review of the record.

[3] To preserve confidentiality, *see* Iowa Code § 910A.13 (1987), the girls will be referred to as N.C. and C.B.

[4] Both girls gave statements and later testified at a discovery deposition and at trial that they could not identify their assailant, but described him as a muscular man of medium height, wearing a short ponytail (J.A. 20, 31, 32-33, 35, 45). C.B. stated that she believed the

On August 14, 1985, the state charged appellant with two counts of lascivious acts with a child.[5] Seven days prior to trial the state applied, pursuant to Iowa Code § 910A.3, to have the testimony of N.C. and C.B. taken outside the courtroom and televised by closed circuit television into the courtroom (J.A. 2-3). The state further requested that appellant be confined behind a screen or mirror that would permit him to see and hear the girls during their testimony but would not allow the witnesses to see the appellant (J.A. 2-3). The state, however, did not articulate or suggest a need or justification for using a screening device or for taking out-of-court testimony (J.A. 2-3).

Defense counsel resisted the state's request in writing and at a subsequent hearing, arguing that the girls were

---

man wore a green mask or make-up, and both girls recalled that he wore a watch, with a traditional clock face, high on his forearm (J.A. 31, 32, 38, 39, 40, 41, 44). Moments after the assailant left the tent, the girls heard a motorcycle start up and drive away (J.A. 20-21, 44, 46-47). The motorcycle was near the house where the tent was located (J.A. 47).

In his defense, appellant Coy offered unrefuted evidence that he always wore his hair short and never in a ponytail (J.A. 64-66); that he was six-foot-three (J.A. 66); that he wore a digital watch (J.A. 64-66); and that he did not own a motorcycle, had never driven one in Clinton, Iowa, and knew no one who owned a motorcycle in that town (J.A. 67).

[5] Iowa Code § 709.8(1) (1987) states:

It is unlawful for any person eighteen years of age or older to perform any of the following acts with a child with or without the child's consent unless married to each other, for the purpose of arousing or satisfying the sexual desires of either of them:

1. Fondle or touch the pubes or genitals of a child.

Violation of Iowa Code § 709.8(1) is a Class "D" felony punishable by confinement for no more than five years and a fine of not more than seven thousand five hundred dollars. Iowa Code § 902.9(4) (1987).

unable to identify the appellant as their assailant[6] (J.A. 6-7, 8, 12-13), that the proposed devise implied that appellant was guilty of the crimes charged (J.A. 8-11), and that a one-way screening device infringed on appellant's right to confront witnesses against him and to a fair trial guaranteed by the sixth and fourteenth amendments (J.A. 5, 9, 11-13).

The trial court overruled appellant's objections (J.A. 16-17). The court also rejected the state's request to take the testimony of N.C. and C.B. outside the courtroom but ordered, pursuant to Iowa Code § 910A.3, that a one-way screening structure be erected *in the courtroom* and be placed between appellant and the witnesses during their testimony[7] (J.A. 16-17). The court did not, however, make

[6] Implicit in counsel's argument that N.C. and C.B. were unable to identify their assailant is the inference that testifying in the presence of appellant would not be presumptively traumatic. Counsel stated "and this is one of the problems with this very glaring, overwhelming device that's being set up, and it certainly seems to indicate that there's some reason why the young women should be fearful of the defendant when they're not identifying the defendant as being their assailant." (J.A. 12). In response, the state asserted that even if N.C. and C.B. could not identify their assailant they might nonetheless be traumatized by testifying in appellant's presence because they assumed he was guilty from the fact that he was charged (J.A. 14). That same inference was urged on the jury by the use of a screening device.

[7] Iowa Code section 910A.3 does not, on its face, clearly contemplate the construction of an in-court barrier between the accused and a victim of child abuse. Subsection (1) envisions the discretionary use of a screening device outside the presence and awareness of the jury. However, both the trial court and the Iowa Supreme Court construed the statute as permitting use of such a structure in court and, for purposes of this appeal, this Court must accept the state court's statutory construction and proceed to test its validity on that basis. *Kingsley Pictures Corp.* v. *Regents*, 360 U.S. 684, 688 (1959); *Guaranty Trust Co.* v. *Blodgett*, 287 U.S. 509, 513 (1933).

a record of any justification for or essential state interest served by the extraordinary in-court arrangement.[8] The court made no findings of fact setting forth a particular need for the screening device at appellant's trial. N.C. and C.B. did not testify, *in camera*, about pre-trial anxiety or indicate that they were fearful of testifying in appellant's presence. Neither girl expressed a preference for use of a screen during her testimony. The state failed to offer lay opinion or expert testimony that a screening barrier should be employed at trial. The record, in fact, is devoid of any evidence demonstrating that either girl would have been traumatized by testifying in open court without the physical obstruction of a screening barrier.[9] The trial judge did not explain his reasons for ordering the use of a one-way screening barrier at appellant's trial. In short, this record contains no factual basis for concluding that an essential state interest was served by the courtroom obstruction imposed by the court.

Prior to trial, the judge noted for the record that the state had "set up a large screen"[10] and that it was "a frame

[8] While many state legislatures in recent years have enacted statutes designed to protect the child witness, only the Iowa statute allows the use of a one-way screen in the courtroom. *See* Brief of the American Bar Association as *Amicus Curiae* 11.

[9] The record does not clearly indicate that N.C. and C.B. were advised that appellant could view them during testimony from behind the screening device. However, Iowa Code § 910A.3(1) requires that the court "inform the child that the party can see and hear the child during testimony." On appeal, the Iowa Supreme Court noted that appellant "makes no assertion trial court failed to comply with the explicit terms of Iowa Code section 910A.3(1)" (J.A. 75). For purposes of this appeal it is assumed that the trial judge complied with the statutory directive.

[10] Describing the in-court arrangement, the judge stated:

. . . what would occur—and for purposes of a writ . . record I'll

with a substance on it which makes it possible for the defendant to see the witness but the witness does not see the defendant" (J.A. 10).[11] The court tested the device and indicated that while seated in the appellant's chair, "It is possible to dimly see a person seated in the witness chair" (J.A. 10). And while seated in the witness chair, ". . . I cannot see anyone at defense table. It reflects the bench. The thing does cause sort of a dramatic emphasis, but we'll have to instruct on it if we grant the motion" (J.A. 11).[12] For the screening device to function properly in the

describe the—that before the bench are two counsel tables with two chairs at each, and that the entrance to the inner court here is to the north and the jury box is to the south, and that the chairs at counsel table, counting from the north to the south, are, at the first table, Chairs No. 1 and No. 2, and at the second table, Chairs No. 3 and No. 4, and that the defendant would be seated in Chair No. 1 and his counsel in Chair No. 2 or wherever else counsel felt it necessary to perform his function. The State would sit at Chair No. 2 (sic). Immediately to the south of the bench is a raised dais, which has been used for various reasons in this court, but which during this trial will be used as a witness box. However—and that dais is two steps—almost two feet raised from the floor. To the south of the wooden rail will be placed a chair, and the chair will be well back. The child witness will sit on that. The child will be in good view of the court and in good view of the jury. At an angle from the bench in the direction of the jury box to the southwest would be a screen, and that that (sic) screen would be made of a material that would make it possible for the defendant to view the child—and counsel would have the right to view the child from any place he wishes—and the child would not be able to see the defendant. The child would enter the courtroom through a door very close to the chair.

(J.A. 5-6). See Appendix A, Diagram 1, Photograph 4.

[11] See Appendix A, Photographs 1 and 3.

[12] Prior to N.C.'s testimony, the court instructed the jury as follows:

> It's quite obvious to the jury that there's a screen device in the courtroom. The General Assembly of Iowa recently passed a law which provides for this sort of a procedure in cases involving children. Now, I would caution you now and I will caution you later that you are to draw no inference of any kind from the

courtroom, the courtroom lights had to be turned off and a panel of bright lights had to be focused directly on the obstruction (J.A. 14; J.S. App. 15a).[13] The one-way barrier was in place throughout the testimony of N.C. and C.B.[14]

Following the testimony of N.C. and C.B., defense counsel moved for a mistrial based on the prejudicial impact of the screening device. That motion was overruled (J.A. 56), as was appeliant's renewed motion for mistrial at the close of the state's case (J.A. 63). On November 19, 1985, the jury returned guilty verdicts on both counts.

Evidence of guilt was by no means overwhelming. N.C. and C.B. testified that they could not identify their assailant (J.A. 19-20, 28-29, 31-32). The descriptions they did offer were inconsistent and varied significantly from the physical characteristics of appellant. The girls described a man of medium height with his hair in a ponytail (J.A. 20, 31-33, 35, 39, 45). Appellant was six-foot-three (J.A. 66) and wore his hair short, never in a ponytail (J.A. 64-66). The assailant wore a watch with a traditional face (J.A. 41); appellant wore a digital watch (J.A. 64-66). Moments

> presence of that screen. You know, in the plainest of language, that is not evidence of the defendant's guilt, and it shouldn't be in your mind as an inference as to any guilt on his part. It's very important that you do that intellectual thing.

(J.A. 17). Apparently, no such instruction was given prior to the testimony of C.B. or at the conclusion of the trial.

[13] The court noted that it was overcast on the day that the screening device was used, and that the darkened courtroom created an "eerie" effect (J.A. 14). See J.S. App. 15a.

[14] N.C. and C.B were the first two witnesses called by the state. Their combined testimony required eighty-eight pages to report, nearly one-third of the transcript of the state's case-in-chief.

after the assailant left the tent, the girls heard a nearby motorcycle start up and drive away (J.A. 20-21, 44, 46-47). Appellant did not own a motorcycle, nor had he operated one in Clinton, Iowa (J.A. 66-67). Criminologist Paul Bush testified that several hairs similar to appellant's were found on the bedding in the tent and on N.C.'s blue shorts (J.A. 50). On cross-examination Bush admitted the similarities were not conclusive (Tr. 159), and testified that five additional hairs were found in the tent. Those hairs were dissimilar to the hair of the appellant and were not identified (J.A. 51). Finally, Officer David Speakman testified that he found a flashlight and a yellow cup that resembled items taken from the girls' tent when he searched appellant's residence (J.A. 59).[15] Appellant testified that he found the flashlight and cup discarded at the corner of his driveway and carried them inside on the morning of August 3 (J.A. 67-68). The yellow cup was found by the police, in plain sight, at the top of a trash container (J.A. 59). During the search of appellant's residence, the police did not find a mask or clothing that matched the description given by N.C. and C.B. of items worn by their assailant (J.A. 60-61). Nor did they find the pair of panties taken from the girls' tent (J.A. 60, 62-63). The police were never able to account for the motorcycle that drove away shortly after the assailant left the tent (J.A. 62).

On appeal, the Iowa Supreme Court affirmed appellant's conviction and held that the trial court was not

[15] An initial search of appellant's home was conducted by C.B.'s father and a local lawyer while the police detained appellant. The two men discovered a yellow cup and reported their finding to the police. The police then used that information to establish the probable cause necessary to obtain a search warrant. Appellant unsuccessfully challenged the constitutionality of the second search by a motion to suppress and on appeal to the Iowa Supreme Court.

constitutionally required to find the screen was necessary or that it served some compelling state interest before allowing it to be used (J.A. 75).[16] The court concluded "use of the screen was not inherently prejudicial in the circumstances of this trial" and, absent a showing of actual prejudice, the contention that appellant was denied his right to a fair trial was without merit (J.A. 79). The court further concluded that appellant's "right of confrontation was not infringed" (J.A. 77). This appeal followed.

INTRODUCTION AND SUMMARY OF ARGUMENT

The right to a fair trial, including a fair jury trial in a criminal case, is a fundamental liberty secured by the fourteenth amendment. *Estelle* v. *Williams*, 425 U.S. 501, 503 (1976); *Drope* v. *Missouri*, 420 U.S. 162, 172 (1975). Critical to this fundamental guarantee is the protection of the trial process from contamination by irrelevant and prejudicial factors. A court must closely scrutinize any courtroom practice or arrangement that might dilute the presumption of innocence, which is a basic component of a fair trial. *See Estelle* v. *Williams*, *supra*; *Estes* v. *Texas*, 381 U.S. 532 (1965).

This case concerns a criminal defendant who, for no justifiable reason, was forced, in the presence of a jury, to sit behind a large and specially lit screening barrier, in a darkened courtroom, during the testimony of the state's two key witnesses. The Iowa statute that authorized this extraordinary courtroom arrangement was held constitu-

[16] The Iowa Supreme Court noted that Iowa Code § 910A.3 does not explicitly require a showing of necessity prior to use of a screening device (J.A. 75), and stated "[b]ecause we conclude the express requirements of section 910A.3(1) fully protect Coy's confrontation right, we hold trial court had no obligation to make an independent finding of necessity." (J.A. 75).

tional by the Iowa Supreme Court even though the statute neither required the trial court to find the screening barrier served an essential state interest nor mandated the consideration of less prejudicial alternatives before allowing it to be used. This Court's unanimous ruling in *Estelle* v. *Williams*, *supra*, that due process will not tolerate an accused to stand trial in prison clothing over his objection, mandates reversal of appellant's conviction.

Whenever a courtroom arrangement is challenged as inherently prejudicial, the proper inquiry is whether there is an unacceptable risk that the jury was influenced in their deliberations by impermissible factors. *Holbrook* v. *Flynn*, 106 S.Ct. 1340, 1345 (1986). Use of the one-way screening barrier in this case branded the appellant with an unmistakable mark of guilt in the eyes of the jury, thus corrupting the fact-finding process.

The record is devoid of any evidence demonstrating that the screening device served an essential state interest. Nor is there evidence that the trial court carefully considered the use of less prejudicial alternatives. Absent such a showing, there is no justification for the infringement on appellant's right to a fair trial. *See Estelle* v. *Williams*, *supra*; *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596 (1982).

Further, the screening device restricted appellant's right to cross-examine witnesses against him by preventing a face-to-face confrontation with his accusers. The confrontation clause of the sixth amendment includes as an essential component the right of a criminal defendant to a face-to-face meeting with the state's witnesses at trial. *Dowdell* v. *United States*, 221 U.S. 326, 330 (1911); *Kirby* v. *United States*, 174 U.S. 47, 55 (1899); *Mattox* v. *United States*, 156 U.S. 237, 244 (1895); *United States* v. *Benfield*, 593 F.2d 815, 821 (8th Cir. 1979). A face-to-face confrontation is essential to fully test the credibility of complaining witnesses. *United States* v. *Benfield*, 593 F.2d at 821.

There is no evidence in the record and the trial court made no finding that the screening barrier was necessary to accomplish some compelling state interest at appellant's trial. Without such a showing, infringement on appellant's right to a face-to-face meeting with adverse witnesses was intolerable.

The Iowa statute, as construed and applied in this case to permit the placement at trial of a screening barrier between appellant and complaining witnesses without the need to demonstrate an essential state interest and to consider less prejudicial means of serving that interest, is constitutionally infirm.

ARGUMENT

I.

PLACEMENT AT TRIAL OF A ONE-WAY SCREENING DEVICE BETWEEN APPELLANT AND COMPLAINING WITNESSES, OVER OBJECTION AND WITHOUT ESTABLISHING AN ESSENTIAL STATE INTEREST OR CONSIDERING LESS PREJUDICIAL ALTERNATIVES, VIOLATED THE FOURTEENTH AMENDMENT.

The right to a fair trial is a fundamental liberty secured by the fourteenth amendment to the United States Constitution. *Estelle* v. *Williams*, 425 U.S. 501, 503 (1976); *Drope* v. *Missouri*, 420 U.S. 162, 172 (1975). The presumption of innocence, although not expressly articulated in the Constitution, has long been recognized by this Court as a basic component of a fair trial under our system of justice. *Coffin* v. *United States*, 156 U.S. 432, 453-60 (1895). To implement and protect this presumption,

courts must carefully guard against dilution of the principle that guilt or innocence is to be determined solely on the basis of probative evidence adduced as proof at trial and not on grounds of official suspicion, indictment, continued custody, or other circumstances of the trial process. *See Taylor* v. *Kentucky*, 436 U.S. 478 (1978); *In re Winship*, 397 U.S. 358 (1970). As Justice Marshall recently wrote:

> Honoring the presumption of innocence is often difficult; sometimes we must pay substantial societal costs as a result of our commitment to the values we espouse. But at the end of the day the presumption of innocence protects the innocent; the shortcuts we take with those whom we believe to be guilty injure only those wrongfully accused and, ultimately, ourselves.

U.S. v. *Salerno*, 107 S.Ct. 2095, 2111-12 (1987) (Marshall, J., dissenting).

A.

PLACEMENT OF A ONE-WAY SCREENING BARRIER BETWEEN APPELLANT AND COMPLAINING WITNESSES AT TRIAL WAS INHERENTLY PREJUDICIAL.

Whenever a courtroom practice, procedure, or arrangement gives rise to the probability of diluting the presumption of innocence, it must be subjected to close judicial scrutiny to determine the likely effects on the judgment of jurors. *See Estelle* v. *Williams*, 425 U.S. 501 (1976) (defendant dressed in identifiable prison clothes); *Estes* v. *Texas*, 381 U.S. 532 (1965) (televising and broadcasting trial); *In re Murchison*, 349 U.S. 133 (1955) (judge presiding at contempt hearing served as "one-man grand jury" out of which the contempt charges arose). While the actual impact of a particular practice or arrangement cannot always be definitively calculated, courts must evaluate probable impact "based on reason, principle, and

common human experience." *Estelle* v. *Williams*, 425 U.S. at 504.

This Court has not had the occasion to review the constitutionality of using a one-way screening device during a criminal jury trial. Nor have the lower federal and state appellate courts been presented with a case involving such a court-ordered obstruction.[17] Nonetheless, in cases involving courtroom procedures and arrangements that similarly single out the criminal defendant in the eyes of the jury, courts have consistently recognized the risk of inherent prejudice.[18]

Prior to 1976, courts, with few exceptions, concluded that a criminal defendant should not be forced to go to trial in prison or jail clothing because of the possible impairment of the presumption of innocence. *Gaito* v. *Brierly*, 485 F.2d 86 (3rd Cir. 1973); *Hernandez* v. *Beto*, 443 F.2d 634 (5th Cir. 1971); *Brooks* v. *Texas*, 381 F.2d 619, 624 (5th Cir. 1967) ("It is inherently unfair to try a defendant for a crime while garbed in his jail uniform. . .");

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[17] Ironically, the only reported decision involving the courtroom screening of a criminal defendant was an Iowa Supreme Court decision that predates passage of Iowa Code § 910A.3. *State* v. *Strable*, 313 N.W.2d 497 (Iowa 1981). In *Strable*, the court allowed a blackboard to be placed between a child abuse victim and the defendant, her stepfather, at trial. Noting that the trial was to the court without a jury and emphasizing the victim/witness's testimony on voir dire that it would be difficult or embarrassing for her to testify without a screen, *Id.* at 500, the Iowa Supreme Court concluded that, even assuming use of a screen was improper, the error was harmless beyond a reasonable doubt. *Id.* at 501.

[18] This Court has also examined the impact of factors that affect the fairness of the trial process in other contexts. *See*, e.g., *Sheppard* v. *Maxwell*, 284 U.S. 333 (1966) ("circus" atmosphere generated by press and prosecutor rendered trial constitutionally unfair).

Commonwealth v. *Keeler*, 264 A.2d 407 (Pa. Super. 1970); *Miller* v. *State*, 457 S.W.2d 848 (Ark. 1970); *People* v. *Shaw*, 164 N.W.2d 7 (Mich. 1969); *People* v. *Zapata*, 220 Cal. App.2d 903, 34 Cal. Rptr. 171 (1963), *cert. denied* 377 U.S. 406 (1964). In *Estelle* v. *Williams*, 425 U.S. 501 (1976), this Court embraced the reasoning of those decisions, stating that where a defendant is compelled to wear prison garb when appearing before a jury, "the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment," *Id.*, at 504-05, and thus erode the presumption of innocence.[19]

Courts have similarly held that a criminal defendant should, except in the most unusual circumstances, appear before the jury free from shackles or other physical restraints, because the presence of restraints may affect the presumption of innocence by marking the defendant as dangerous or suggesting that his guilt is a foregone conclusion.[20] *Tyars* v. *Finner*, 709 F.2d 1274 (9th Cir. 1983); *Harrell* v. *Israel*, 672 F.2d 632 (7th Cir. 1982); *Zygadlo* v. *Wainwright*, 720 F.2d 1221 (11th Cir. 1983); *United States* v. *Samuel*, 431 F.2d 610 (4th Cir. 1970), *cert. denied* 401 U.S. 946 (1971).[21] While holding that a contumacious defendant may be bound and gagged as a last resort, this Court perceived the inherent prejudice in such a practice:

> Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feeling about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold.

Illinois v. *Allen*, 397 U.S. 337, 344 (1970).

The placement of a specially lit frame structure in front of appellant at trial, no less than trying him in prison clothes or shackles, eroded the presumption of innocence so basic to our adversary system, and branded him in the minds of the jury "with an unmistakable mark of guilt." *Estelle* v. *Williams*, 425 U.S. at 518 (Brennan, J., dissenting). The screening device was neither subtle nor unobtrusive. The court noted that the structure was large and imposing (J.A. 10), and it resembled a gallows in shape and construction.[22] The barrier was placed directly in front of appellant at counsel table (J.A. 6) and served to shield only him from the sight of the complaining witnesses (J.A. 10).[23] To facilitate proper functioning of the

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[19] The Court in *Estelle* concluded that the failure of the defendant to object to prison clothes "is sufficient to negate the presence of compulsion necessary to establish a constitutional violation." *Id.* at 512-13. Here it is clear that appellant neither "consensually relinquished" his substantive right nor made an "inexcusable procedure default" by failing to object, *Id.* at 513 (Powell, J., concurring), to the use of a screening barrier. Defense counsel repeatedly objected to the proposed screening device (J.A. 6-7, 8-9, 12-13, 15-16, 18) and moved for a mistrial following the testimony of N.C. and C.B. (J.A. 56) and at the close of the state's case (J.A. 63).

[20] The prejudicial impact of unnecessary restraint was recognized by the earliest commentators on criminal practice. Beale, TREATISE ON CRIMINAL PLEADING AND PRACTICE, § 58, p. 50 (1899) ("The accused person at his arraignment and throughout his trial must be treated with humanity. He is not to be brought to the bar with marks of ignominy, nor is he to be manacled unless there is danger of rescue or escape. Indeed, it has been held that unnecessary constraint is unconstitutional, since it hampers him in his defence.").

[21] In *Elledge* v. *Dugger*, 823 F.2d 1439 (11th Cir. 1987), the court held that shackling a defendant in the presence of the jury *after* conviction for a capital crime is so inherently prejudicial that it denied the defendant his constitutional right to a fair capital sentencing proceeding.

[22] See Appendix A, Photographs 1 and 2.

[23] See Appendix A, Diagram 1, Photograph 3.

screening device, the courtroom was darkened and a panel of bright lights was focused directly on it (J.A. 14; J.S. App. 15a). The children were ushered into the courtroom through a special door near the witness chair (J.A. 6).[24] The net effect of this unprecedented courtroom arrangement was to place "dramatic emphasis" (J.A. 11) on the testimony of N.C. and C.B., while the jury's attention was focused on appellant, seated in the darkened and "eerie" courtroom (J.A. 14). Like Hester Prynne's scarlet "A", the screening barrier was a constant reminder that appellant was accused and presumed guilty of a loathsome crime. The screening device remained in place, with appellant immobile behind it, throughout the testimony of the state's two most critical witnesses.

In *Holbrook* v. *Flynn*, 106 S.Ct. 1340 (1986), this Court perceived "the threat that a roomful of uniformed and armed policemen might pose to defendant's chances of receiving a fair trial," *Id.* at 1347, but nonetheless concluded that the use of four state troopers for extra courtroom security did not brand the defendant with obvious guilt. Distinguishing the use of armed troopers from prison garb and other courtroom practices deemed inherently prejudicial, this Court pointed to the "wider range of inferences that a juror might reasonably draw from the officers' presence." *Id.* at 1346.

> While shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large, the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable.

Id. The Court instructed that when a courtroom arrangement is challenged as inherently prejudicial, the focal inquiry is whether there is an unacceptable risk that a

[24] See Appendix A, Photograph 4.

jury may consciously or subconsciously be influenced in their deliberations by impermissible factors. *Id.* at 1347.

Stressing the distinctions drawn in *Flynn*, the Iowa Supreme Court, in this case, held that the screening barrier was not inherently prejudicial because it "did not tend to brand Coy as guilty" and because the jury "likely concluded the screen was being used to reduce the trauma necessarily attendant to the children's testimony" (J.A. 79). The court's conclusion, however, begs the question and ignores the inescapable inferences encouraged by the scene presented to the jury during the testimony of the state's key witnesses.

The suggestion that the jury inferred the one-way screening device was necessary to reduce the trauma attendant to the childrens' testimony in open court, apart from trauma associated with testifying in the appellant's presence, is illogical. N.C. and C.B. were still required to relate the events of August 3, 1985 and were subjected to cross-examination in a courtroom filled with strangers. The one-way screening barrier did not shield the children from observation by the general public or exposure to the media.[25] The jury might reasonably have drawn a "wider range of inferences" if the children had testified by deposition or videotape, or if the court had ordered construction of a "Child-Courtroom."[26] Those devices separate the wit-

[25] See Appendix A, Diagram 1, Photographs 2, 3 and 4.

[26] David Libai first proposed the concept of a "Child-Courtroom" as a means of protecting the child victim and avoiding infringement on a defendant's constitutional rights. Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977 (1969). The Child-Courtroom would allow the child to testify in an informal and relaxed manner while the child sees only the judge, prosecutor, defense counsel and "child examiner." *Id.* at 1017. "The accused, the jury and the audience would be seated behind a one-way glass, separating them from the judge's room, but enabling them to observe everything that occurs there." *Id.*

ness from the courtroom generally and not just from the accused.

Singling out the appellant for screening signalled to the jury that he, and not the courtroom generally, was the cause of continuing trauma to the child witnesses. And from that alleged trauma the jury inevitably inferred that the court and the complaining witnesses believed appellant was guilty, presumably based on evidence not produced at trial.[27] The jury was encouraged to speculate as to the existence of inculpatory evidence, not admissible at trial, that would explain the need for the extraordinary in-court arrangement. The screening device thereby created a significant danger that the fact-finding process was corrupted by "mere suspicion." *Estelle* v. *Williams*, 425 U.S. at 518 (Brennan, J., dissenting).

The one-way barrier further led the jury to believe the appellant was guilty. Placement of a screening structure between appellant and the complaining witnesses does not reduce the trauma of testifying in open court except to the extent it reduces harm caused by testifying in the presence of the appellant. Jurors inferred that the appellant could only be the cause of continuing trauma to the witnesses if he was the perpetrator of the crime for which he stood accused. The jurors, although required to presume the appellant's innocence until proven guilty, inevitably considered the one-way screening device as irrebuttable evidence of his guilt.

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[27] From the onset of the criminal investigation through trial, N.C. and C.B. consistently maintained that they were unable to identify their assailant (J.A. 7, 14, 20, 32). There is no indication in the record that either girl held a reasonable belief that appellant had been the intruder in their tent on August 3.

Through the same inferential process, the screening device injected emotional factors into the jury's deliberations inappropriate to a jury's function in the criminal justice system. A jury is charged to review evidence objectively and dispassionately; in essence, a criminal defendant's right to a jury trial guarantees "a fair trial by a panel of impartial, 'indifferent' jurors." *Irwin* v. *Dowd*, 366 U.S. 717, 722 (1961). Use of the screening barrier suggested child abuse victims suffer continuing trauma, and necessarily evoked a sympathetic juror response.[28] That response, coupled with the inference that appellant was the cause of that trauma, further eroded the presumption of innocence. Believing that N.C. and C.B. would suffer additional psychological harm from testifying in appellant's presence emphasized to the jury the importance of returning a guilty verdict. Jurors were implicitly encouraged to believe that the failure to return a guilty verdict, even in the absence of proof beyond a reasonable doubt, would permit the appellant to return to his home, next door to N.C., and result in further, unabated trauma.[29]

Use of a screening device at trial injected additional dangers into the accuracy and objectivity of the fact-

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[28] *Cf. Booth* v. *Maryland*, 107 S.Ct. 2529 (1987) (providing jury with victim impact statement at sentencing phase of capital murder trial creates constitutionally unacceptable risk that jury will impose death penalty in arbitrary and capricious manner).

[29] Appellee's argument that the screening barrier was less prejudicial since it was only in place during the testimony of two witnesses (Appellee's Motion to Dismiss, p. 3) is unpersuasive. Use of a screening barrier during the testimony of the two girls emphasized the continuing nature of the injury inflicted on child abuse victims. By screening only appellant, the court implied that he was the sole cause of that injury.

finding process. In preparing his defense, for example, trial counsel surely considered asking the complaining witnesses whether they could make an in-court identification of appellant as their assailant. Since N.C. and C.B. consistently testified that they could not identify their assailant, demonstration of that fact to the jury would have been an effective defense strategy. The presence of the screen, however, may have foreclosed that tactic. Even if the trial court would have allowed appellant to emerge from behind the barrier, defense counsel would have had to weigh the juror's reactions to subjecting the children to the trauma that the screen was presumably aimed at preventing. An in-court identification also would have emphasized the unusual courtroom arrangement to the jury and exacerbated the prejudicial impact of the screening structure.

The in-court screening barrier was "an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold." *Illinois* v. *Allen*, 397 U.S. at 344. Courtroom modifications that lend dramatic emphasis to the testimony of state's witnesses and focus singular attention on the accused detract from the atmosphere essential to a fair trial. One need only imagine the appellant seated behind a large, specially lit, screen structure, in a darkened and "eerie" courtroom, during the testimony of the state's two critical witnesses to appreciate the overwhelming influence that the extraordinary arrangement had on the jury.[30] Echoing the words of Justice Brennan:

> It is difficult to conceive of any other situation more fraught with risk to the presumption of innocence and the standard of reasonable doubt.

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[30] See Appendix A, Photographs 1, 2 and 3; J.S. App. 15a.

Estelle v. *Williams*, 425 U.S. at 519. (Brennan, J., dissenting).

Few appellate courts have reviewed the impact of structural courtroom alterations on a defendant's right to a fair trial, presumably because few trial courts have endorsed such transformations. However, in analogous situations, courts have recognized and decried the impairment of the presumption of innocence caused by such modifications. In *Young* v. *Callahan*, 700 F.2d 32 (1st Cir. 1983), for example, the issue was whether defendant's due process rights were violated when he was confined at trial, over objection and without inquiry into security needs, to the prisoner's dock.[31] Finding it harmful constitutional error to deny the defendant's motion to sit at counsel table, the court emphasized that confinement in a prisoner's dock may erode the presumption of innocence in the minds of the jurors.

> The practice of isolating the accused in a four foot high box very well may affect a juror's objectivity. Confinement in a prisoner's dock focuses attention on the accused and may create the impression that he is different or dangerous. By treating the accused in this distinctive manner, a juror may be influenced throughout trial. The impression created may well erode the presumption of innocence that every person is to enjoy.

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[31] "The dock is a box approximately four feet square and four feet high. It is open at the top so that the defendant's head and shoulders can be seen when he or she is seated. The dock is placed typically at the center of the bar enclosure which separates the spectator's section from that portion of the courtroom reserved for trial principals. The dock is usually fifteen to twenty feet behind counsel table, and is sometimes on a raised platform." *Walker* v. *Butterworth*, 457 F.Supp. 1233, 1238 (D. Mass. 1978).

Young v. *Callahan*, 700 F.2d at 34. (quoting *Walker* v. *Butterworth*, 599 F.2d 1074, 1080 (1st Cir. 1979)).

Placement of a screening barrier between appellant and complaining witnesses, like confinement in a prisoner's dock, focused the jury's attention on appellant and implied that he was different or dangerous. By treating appellant in that distinctive manner throughout the critical testimony of N.C. and C.B., jurors were encouraged to infer he had caused and continued to cause psychological harm to the children. And from that harm jurors inevitably inferred that appellant was guilty as charged. Because the jury was unable to presume appellant's innocence, the trial process was constitutionally flawed.

B.

GIVEN THE INHERENTLY PREJUDICIAL IMPACT OF THE IN-COURT SCREENING BARRIER, SUCH AN EXTRAORDINARY DEVICE COULD NOT CONSTITUTIONALLY BE IMPOSED WITHOUT A SHOWING, SPECIFIC TO APPELLANT'S TRIAL, THAT IT SERVED AN ESSENTIAL STATE INTEREST AND THAT THE COURT CAREFULLY CONSIDERED USE OF LESS PREJUDICIAL ALTERNATIVES.

When the state seeks to encroach upon fundamental liberties such as the right to a fair trial, it must demonstrate first that an essential interest is at stake, and second that no less intrusive means is available to insure that the state's interest is served. *See Holbrook* v. *Flynn*, 106 S.Ct. 1340 (1986); *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596 (1982); *Estelle* v. *Williams*, 425 U.S. 501 (1976). Neither of these elementary requirements was satisfied here.

1. The Record In This Case Does Not Demonstrate That The One-Way Screening Device Served An Essential State Interest.

In *Globe*, this Court reviewed the constitutionality of a Massachusetts law which required judges to exclude the

press and public from the courtroom during the victim's testimony in criminal cases involving child sex abuse. The Court said that while the "right of access to criminal trials is not absolute," where the state attempts to infringe on that right, it must show that closure is "necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Id.* at 606-07 (citations omitted); *see also Estelle* v. *Williams*, 425 U.S. at 505 (since "compelling an accused to wear jail clothing furthers no essential state policy," the practice is unconstitutional). Finding that the interests advanced by the state in *Globe* did not justify a mandatory closure rule,[32] the Court held that the state statute was unconstitutional.

The Court further asserted that whether closure of a criminal trial is necessary to protect the welfare of a child witness is a question to be determined by the trial judge on a "case-by-case basis." *Id.* at 608. Among the factors relevant to the trial court's decision, this Court identified "the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives." *Id.* A case-by-case analysis of relevant factors, as opposed to a blanket approach, ensures that the fundamental right in question will not be infringed upon or restricted except when absolutely necessary to protect the state's interest. *Id.* at 609. This Court further suggested that individualized determinations of an essential state interest be included in the trial record as particularized findings of

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[32] The Court reduced those interests to two: "the protection of minor victims of sex crimes from further trauma and embarrassment; and the encouragement of such victims to come forward and testify in a truthful and credible manner." *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. at 607.

fact. *Id.* at 608 n. 20 (*citing Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980)).

The showing required by *Globe* to justify state infringement on the right of access to criminal trials should be at least as demanding when the competing interest is a criminal defendant's right to a fair trial. While the right of access is not absolute and is of more recent origin, the right to a fair trial is the bedrock of due process and has been called "the most fundamental of all freedoms." *Estes* v. *Texas*, 381 U.S. at 540. When conflicts between those rights have developed, the press and public's right of access to criminal trials has been circumscribed to maintain the atmosphere essential to the preservation of a fair trial. *See Estes* v. *Texas*, 381 U.S. 532 (1965) (televising criminal trial, over objection, was inherently invalid as infringing on defendant's right to fair trial).

Accordingly, courts have required case-specific findings of an essential interest when the state seeks to impose inherently prejudicial arrangements or procedures on criminal defendants at trial. Most post-*Estelle* cases involving considered responses to the issue of courtroom security have recognized the need both to articulate a special reason why the practice is required and to minimize the prejudicial impact of extraordinary measures on the jury. In *Brewster* v. *Bordenkircher*, 745 F.2d 913 (4th Cir. 1984), the court reaffirmed principles articulated fourteen years earlier in *United States* v. *Samuel*, 431 F.2d 610 (4th Cir. 1970), outlining proper procedures to be followed when determining the propriety of shackling.

> Whenever unusual visible security measures in jury cases are to be employed, we will require the district judge to state for the record, out of the presence of the jury, the reasons therefor and give counsel an opportunity to comment thereon, as well as to persuade him that such measures are unnecessary.

Brewster v. *Bordenkircher*, 745 F.2d at 916. The court properly recognized that a trial judge's discretion is not absolute and the rationale for compelling special security measures must be articulated on the record, so that an appellate court may review the exercise of that discretion. *Id.* at 916. *See also Elledge* v. *Dugger*, 823 F.2d 1439 (11th Cir. 1987) (court denied defendant opportunity to contest basis for shackling and state failed to demonstrate compelling interest); *Zygadlo* v. *Wainwright*, 720 F.2d 1221 (11th Cir. 1983) (trial court specifically entered the considerations supporting its decision to shackle defendant into record and allowed defense counsel to object thereto); *Tyars* v. *Finner*, 709 F.2d 1274 (9th Cir. 1983) (nothing in the record justified use of restraints in presence of jury or demonstrated that less restrictive alternatives were considered); *Woodard* v. *Perrin*, 692 F.2d 220 (1st Cir. 1982) (extensive pretrial testimony on likelihood that defendant would not conduct himself appropriately at trial); *United States* v. *Garcia*, 625 F.2d 162 (7th Cir. 1980) (a showing of "extreme need" required to justify use of physical restraints at trial and showing should be made on record after hearing).

In *Estelle* v. *Williams*, this Court established that the state interest needed to justify the use of a compelled trial practice that might prejudice a criminal trial jury must be an "essential" one,[33] and that convenience does not

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[33] In *Estelle*, the Court noted that the American Bar Association's Standards for Criminal Justice disapproved the practice of compelling a defendant to appear in court in the distinctive attire of a prisoner. *Estelle* v. *Williams*, 425 U.S. at 504. Those standards state with respect to restraint of a criminal defendant: "(C) Defendants and witnesses should not be subjected to physical restraint while in court unless the trial judge has found such restraint reasonably necessary to maintain order. If the trial judge orders such restraint, he should

qualify as such an interest. *Estelle* v. *Williams*, 425 U.S. at 505; *accord Holbrook* v. *Flynn*, 106 S.Ct. at 1345. And in *Young* v. *Callahan*, 700 F.2d 32 (1st Cir. 1983), the court, after reviewing the use of a "prisoner's dock" in criminal proceedings, held that:

> . . . it was constitutional error for the trial court, *without any finding that restraint was necessary*, over appellant's constitutional objection, to deny appellant's motion to allow him to sit at counsel table rather than in the prisoner's dock.

Id. at 37 (emphasis added).

Commentators on statutory reforms that seek to protect child witnesses also insist that new procedures only be used upon a showing that they are necessary in a particular case. American Bar Association guidelines, for example, state that one-way mirrors should only be used in child abuse cases where there is a showing of necessity and the defendant's right to confrontation is not impaired. GUIDELINES FOR THE FAIR TREATMENT OF CHILD WITNESSES IN CASES WHERE CHILD ABUSE IS ALLEGED, § 3(g) (Approved July 10, 1985).[34] The National Legal Resource Center for Child Advocacy and Protection states:

> It is also vital to carefully evaluate the use of any new procedures to protect children by using a case-by-case analysis, rather than a blanket approach, and to only use the reforms when necessary.

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enter into the record of the case the reasons therefor." American Bar Association Project on Standards for Criminal Justice, *Trial by Jury* § 4.1(b), pp. 91-92 (App. Draft 1968).

[34] The American Bar Association Guidelines were jointly prepared by the A.B.A. Criminal Justice Section's Prosecution and Defense Function Committees.

PROTECTING CHILD VICTIM/WITNESS—SAMPLE LAWS AND MATERIALS, p. ii (2nd ed. 1987).

The record in the present case provides no basis from which this Court can discern the trial judge's rationale for imposing a screening barrier or whether an essential state interest was served by it. The state failed to support its application for a one-way screen, by affidavit or otherwise (J.A. 2-3), and further failed to establish at any hearing that a barrier was in fact necessary in this particular case. While the trial judge allowed defense counsel to assert his constitutional objections to the screening barrier, the court provided no explanation for his ultimate ruling. He did not make specific findings of fact as to the need for a screening device at this trial, nor did he conduct an evidentiary hearing during which the child witnesses, their parents and relatives, or expert witnesses could provide some justification for the extraordinary courtroom structure.[35] Far from treating the decision to erect a screening device in front of appellant as necessary to protect child witnesses, the trial judge invoked the Iowa statute on the basis of a record that is characterized by a constitutionally intolerable silence on the issue of whether that device would serve any essential state interest.

An essential state interest, furthermore, cannot be inferred from the record in this case or from the nature of

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[35] Assuming that protection of the child witnesses from trauma or embarrassment might have been a motivating force behind the court's ruling, the trial judge could have made a record based on the factors listed by this Court as relevant to aid in a trial court's determination of whether a sexual abuse prosecution should be closed to the press and public. *See Globe Newspaper Co.* v. *Superior Court*, 457 U.S. at 607.

the criminal charge. Assuming, *arguendo*, that the state's unarticulated interest in screening the appellant was similar to the state interest in *Globe*, ("the protection of minor victims of sex crimes from further trauma and embarrassment; and the encouragement of such victims to come forward and testify in a truthful and credible manner," *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. at 607), there is no evidence suggesting that those interests would be served by screening the appellant *in this case*.

There is no indication that either child witness was traumatized or embarrassed by the prospect of testifying in open court or in the presence of the appellant, a person that neither witness identified as her assailant.[36] The clarity of the testimony of N.C. and C.B, and the articulate and direct nature of their responses, at least to the extent such can be gleaned from a sterile transcript, belies a justification based on trauma. Further, this Court cannot and should not assume that all victims of child abuse suffer further trauma by repeating their testimony in court. *Kentucky* v. *Stincer*, 107 S.Ct. 2658, 2668 n. 20 (1987) (*citing* amicus brief of American Psychological Association for point that "intuitive view that child victims of sexual abuse are particularly vulnerable in legal proceedings may not be correct for all children"); *Hochheiser* v. *Superior Court*, 161 Cal. App.3d 777, 208 Cal. Rptr. 273 (1984) (generalized belief in psychological trauma to child abuse victims insufficient to establish essential state interest in particular case); *see also* Berliner, *The Child Witness: The Progress and Emerging*

[36] As stated in *Globe*, the "measure of the State's interest lies not in the extent to which minor victims are injured by testifying, but rather in the incremental injury suffered by testifying," *Id.* at 607 n. 19, in the presence of appellant.

Limitations, 40 U. MIAMI L. REV. 167, 174-75 (1985) (". . . children sometimes psychologically benefit by participating in the criminal justice system"); D. Runyan, *Impact of Legal Intervention on Sexually Abused Children* (paper presented to National Family Violence Research Symposium (July 7, 1987)). One commentator on criminal procedure reforms designed to protect child victims summarized the empirical research on child courtroom trauma as follows:

> . . . there may be a more fundamental question of whether substantial procedural changes to protect children are in fact desirable in all cases. Arguably, any attempts to institute such reforms are premature. At this point, the behavioral science literature is bereft of research testing assumptions about ways in which the legal system induces and enhances trauma in child victims. Research might initially best be centered on evaluation of carefully designed demonstration projects involving, for example, special youth examiners. It may be that assumptions that reducing the audience in trials, using special examiners for interrogation, etc. will alleviate stress are invalid. Indeed it is conceivable that for some youngsters the opportunity to have their day in court would be cathartic and symbolically put an end to the episode in their minds.

Melton, *Procedural Reforms to Protect Child Victim/Witnesses in Sex Offense Proceedings*, CHILD SEXUAL ABUSE AND THE LAW, p. 194 (5th ed. 1985).

2. The Record In This Case Does Not Indicate That The Trial Judge Carefully Considered Use Of Less Prejudicial Alternatives.

The trial court not only failed to make findings of some essential state interest served by the one-way screening device, but also failed to investigate fully the availability

of less prejudicial means to accomplish that interest. State infringement on fundamental rights must be "narrowly tailored," *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. at 607, to meet an articulated and compelling state interest. This Court has instructed lower courts to consider the least drastic alternative when the state seeks to infringe on a defendant's right to a fair trial based on concerns for security. *See Illinois* v. *Allen*, 397 U.S. at 344 (". . . no person should be tried while shackled and gagged except as a last resort"); *cf. Holbrook* v. *Flynn*, 106 S.Ct. at 1347-48. In response, lower courts have consistently required that "[c]onsideration of less drastic alternatives should be part of the trial judge's balancing of the defendant's rights and the needs for security." *Wilson* v. *McCarthy*, 770 F.2d 1482, 1486 (9th Cir. 1985) (shackles); *see also Elledge* v. *Dugger*, 823 F.2d 1439 (11th Cir. 1987) (shackles); *Tyars* v. *Finner*, 709 F.2d 1274 (9th Cir. 1983) (restraints); *Young* v. *Callahan*, 700 F.2d 32 (1st Cir. 1983) (prisoner's dock); *Woodard* v. *Perrin*, 692 F.2d 220 (1st Cir. 1982) (shackles); *State* v. *Tolley*, 226 S.E.2d 353 (N.C. 1976) (restraints).

The record here indicates that at one point the trial court briefly mentioned an alternative to the in-court screening barrier.[37] That passing reference, however, was hardly the careful consideration of less prejudicial alternatives comtemplated by previous decisions of this Court. Rather than place a large, specially lit obstruction in the courtroom, the trial judge could have ordered that the

[37] In rejecting the state's application to use closed circuit television equipment, the trial judge stated: "That's very dramatic. That's very unnatural. That puts strange untested emphasis, which - it's an untested thing that we don't know a lot about. The screen adds something to a courtroom that we're not used to, also, but it seems the more moderate and least obtrusive approach" (J.A. 6).

children testify by deposition, by videotape or in a child-courtroom.[38] Each of those possibilities would have permitted N.C. and C.B. to be shielded from appellant, if necessary, but without singling him out as different or dangerous. The alternatives readily available to the trial court did not have the same potential for injecting impermissible factors into the trial process as did the use of the in-court screening barrier.[39]

Since the state failed to establish a compelling interest for the use of a screening barrier, and since the trial court failed to consider available alternatives that were far less prejudicial, the infringement on appellant's right to a fair trial cannot be constitutionally tolerated. Given the range of less prejudicial alternatives available to the trial court, this Court should hold that use of an in-court screening barrier, over objection, like compelling a defendant to attend trial in prison clothing, is never constitutionally permissible. *See Estelle* v. *Williams*, *supra*.

II.

PLACEMENT OF A ONE-WAY SCREENING BARRIER BETWEEN APPELLANT AND COMPLAINING WITNESSES AT TRIAL, OVER OBJECTION AND WITHOUT A SHOWING OF NECESSITY, VIOLATED THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT.

The sixth amendment's confrontation clause provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him."

[38] Less drastic still, the judge might have privately instructed N.C. and C.B. that they did not have to look at appellant during their testimony.

[39] The state initially requested that the one-way screening device be used *outside the jury's presence* (J.A. 2-3).

The right of confrontation is "an essential and fundamental requirement for . . . [a] fair trial" and is binding on the states. *Pointer* v. *Texas*, 380 U.S. 400, 405-06 (1965). The text of the confrontation clause "plainly envisions that witnesses against the accused shall, as a rule, *testify in his presence.*" *Kentucky* v. *Stincer*, 107 S.Ct. 2658, 2669 (1987) (Marshall, J., dissenting) (emphasis in original). As this court has recognized, "it is this literal right to 'confront'[40] the witness at the time of trial that forms the core of the values furthered by the confrontation clause," *California* v. *Green*, 399 U.S. 149, 157 (1970), guaranteeing the accused an opportunity to compel a "face-to-face" meeting with witnesses before the trier of fact. *Mattox* v. *United States*, 156 U.S. 237, 242 (1895).

A.

USE OF A ONE-WAY SCREENING BARRIER AT APPELLANT'S TRIAL INFRINGED ON HIS RIGHT TO A FACE-TO-FACE MEETING WITH COMPLAINING WITNESSES.

Early Supreme Court decisions construing the confrontation clause describe two essential components of the defendant's right to confront his accusers. *See Snyder* v. *Massachusetts*, 291 U.S. 97, 106 (1934); *Dowdell* v. *United States*, 221 U.S. 326, 330 (1911); *Kirby* v. *United*

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[40] "*confront* . . . 1: to stand facing or opposing esp. in challenge . . . 2 a: to put or bring face to face. . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, p. 477 (1966). "*confrontation* . . . the bringing face to face of an accused person and his accusing witnesses—used esp. in the phrase *right of confrontation*." *Id.* at 477. "*confrontation*. In criminal law, the act of setting a witness face to face with the prisoner, in order that the latter may make any objection he has to the witness, or that the witness may identify the accused." BLACK'S LAW DICTIONARY, p. 272 (5th ed. 1979).

States, 174 U.S. 47, 55 (1899); *Mattox* v. *United States*, 156 U.S. 237, 244 (1895). First, the defendant has the right to a face-to-face meeting with the state's witnesses at trial. *Dowdell*, 221 U.S. at 330, *Kirby*, 174 U.S. at 55; *Mattox*, 156 U.S. at 224. The purpose of this face-to-face meeting is to allow the fact-finder to observe the demeanor of the witness while he or she is making accusations against the defendant. Note, *The Constitutionality of the Use of Two-Way Closed Circuit Television to Take Testimony of Child Victims of Sex Crimes*, 5 FORDHAM L. REV. 995, 1006 (1985). "Most believe that in some undefined but real way recollection, veracity, and communication are influenced by face-to-face challenge." *United States* v. *Benfield*, 593 F.2d 815, 821 (8th Cir. 1979); *see also Herbert* v. *Superior Court*, 117 Cal. App.3d 661, 172 Cal. Rptr. 850 (1981). Secondly, the defendant must have the opportunity to conduct an effective cross-examination of the state's witnesses. *Kentucky* v. *Stincer*, 107 S.Ct. at 2662-64; *Douglas* v. *Alabama*, 380 U.S. 415, 418 (1965). The function of cross-examination is to test the believability of the witness and the truth of his or her testimony. *Davis* v. *Alaska*, 415 U.S. 308, 316 (1974).

While recent Supreme Court decisions interpreting the confrontation clause focused on the right of cross-examination, *see Kentucky* v. *Stincer*, 107 S.Ct. at 2662,[41]

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[41] In *Stincer* this Court held that a defendant's confrontation rights were not violated by his exclusion from a competency hearing of two children who had been the victims of sodomy. *Id.* at 2666. The Court's analysis focused on the confrontation clause's "functional purposes in ensuring a defendant an opportunity for cross-examination," *Id.* at 2664, and not on the right to face-to-face meeting with witnesses at trial. The defendant, in fact, was physically present throughout the trial and fully able to confront the state's witnesses at that time. Concluding that defendant's exclusion from the competency hearing did not interfere with a full and effective cross-examination at trial, this Court held that his confrontation rights were not infringed. *Id.* at 2664-66.

Delaware v. *Van Arsdall*, 106 S.Ct. 1431, 1435 (1986), the right to a face-to-face meeting with adverse witnesses at trial is still an essential component of confrontation. *See Delaware* v. *Van Arsdall*, 106 S.Ct. 1431, 1435 (1986) (right of confrontation includes right to confront witnesses physically); *Ohio* v. *Roberts*, 448 U.S. 56, 65 (1980) (recognizing "Framers' preference for face-to-face accusation"). After surveying the often conflicting statements about the requisites of confrontation, the Eighth Circuit Court of Appeals concluded that a face-to-face meeting at trial is generally required.

> Normally the right of confrontation includes a face-to-face meeting at trial at which time cross-examination takes place. *Mattox*, *Kirby*, *Dowdell*, and *Snyder* . . . all support that view. While some recent cases use other language, none denies that confrontation required a face-to-face meeting in 1791 and none lessens the force of the sixth amendment.

United States v. *Benfield*, 593 F.2d at 821.[42] Lower courts have also construed the sixth amendment as generally

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[42] Prior to the adoption of the Bill of Rights, one delegate to the Massachusetts convention complained about the lack of constitutional protections afforded the criminally accused. His objections foreshadowed the sixth amendment.

> It is a maxim universally admitted, that the safety of the subject consists in having a right to a trial as free and impartial as the lot of humanity will admit of. Does the Constitution make provision for such a trial? I think not . . . The mode of trial is altogether undetermined; whether the criminal is to be allowed the benefit of counsel; whether he is to be allowed to meet his accuser face to face; whether he is to be allowed to confront the witnesses, and have the advantages of cross-examination, we are not yet told.

2 J. Elliot, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION, 109-11 (reprint 1974) (1st ed. 1836) (quoted in Note, *Criminal Defendant has Sixth Amendment Right to Physically Confront Witnesses at Videotape Despition*, 4 WASH. U.L.Q. 1106, 1110-11 (1979)).

requiring face-to-face confrontation. *See Hochheiser* v. *Superior Court*, 161 Cal. App.3d 777, 208 Cal. Rptr. 273 (1984); *Herbert* v. *Superior Court*, 117 Cal. App.3d 661, 172 Cal. Rptr. 850 (1981); *State* v. *Tafoya*, 729 P.2d 1371 (N.M. 1986).

A defendant's right of confrontation has been referred to by this Court as a "trial right." *Barber* v. *Page*, 390 U.S. 719, 725 (1968); *see also California* v. *Green*, 399 U.S. 149, 157 (1970) ("right to 'confront' the witness at time of trial"). Placement of a screening barrier between appellant and the state's key witnesses, *at trial*, significantly infringed on that right. Appellant was denied an effective means of "testing the recollection and sifting the conscience of the witness." *Mattox* v. *United States*, 156 U.S. at 237. Furthermore, face-to-face confrontation is an essential ingredient of an effective cross-examination at trial. Allowing the jury to view the demeanor and listen to the testimony of N.C. and C.B. while the children faced the appellant would have aided the jury in their determination of whether the testimony was worthy of belief.[43]

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[43] In *State* v. *Tafoya*, 729 P.2d at 1374, the court questioned the need for face-to-face confrontation where only two victims had been able to identify the defendant in a lineup. The state's case in *Tafoya* rested in large part on scientific evidence. The defendant's fingerprints were found at the crime scenes of all but one victim. Serology evidence consistent with defendant's characteristics was present in the case of two victims. *Id.* at 1378. While N.C. and C.B. did not identify appellant as their assailant, their descriptions of the intruder in their tent was central to the state's case (Tr. 344-46). Those descriptions changed over time on critical points. For example, immediately after the incident, the girls described the assailant's ponytail as three to four inches long (J.A. 60). At trial the girls testified that the ponytail was "little" (J.A. 20) and "about an inch long" (J.A. 39). By the time of trial, of course, the girls were aware that appellant wore his hair short (J.A. 64-66).

Id.

The screening barrier also impeded appellant's view of the witnesses as they testified (J.A. 10-11).[44] Unable to see the reactions of the witnesses clearly, appellant was hindered in assisting his counsel during their examination. Defense counsel was also screened from the witnesses so long as he was seated at the defense table.[45] Counsel had to move away from the table, and his client, to see the witnesses and conduct his cross-examination. Appellant's access to counsel was thus restricted during the critical cross-examination of N.C. and C.B.

The effect of this infringement of appellant's confrontation rights was to undermine the integrity of the fact-finding process. Cross-examination is the "principal means by which the believability of a witness and the truth of his testimony are tested." *Davis* v. *Alaska*, 415 U.S. at 316. Absent a face-to-face meeting with appellant,

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[44] Testing the device, the court said, "It is possible to dimly see a person seated in the witness chair." (J.A. 10). Later, to clarify the record, he stated, "You can see the features of the person seated in the witness chair, but it is dark." (J.A. 11). See Appendix A, Photographs 2 and 4.

[45] Defense counsel argued: "I would state that is going to create an unusual situation if counsel is going to be addressing witnesses without being able to be seen by them and not being able to be seen by many members of the jury. If I want to get up and move over here, I can, but—I guess what I'm saying is this is creating an unusual and artificial situation, and the message being conveyed is that this man is guilty." (J.A. 16). See Appendix A, Photograph 2. By custom and local rule, Iowa attorneys must remain seated at counsel table during the examination of witnesses, except when it is necessary to approach the witness for purpose of presenting or examining exhibits. *See*, e.g., Iowa U.S.D.C. Rule 1.5.8. Movement of defense counsel during the questioning of N.C. and C.B. further emphasized to the jury the special nature of the courtroom arrangement.

the credibility of N.C. and C.B. and the believability of their testimony could not be fully and effectively explored.[46]

B.

THE STATE DID NOT MAKE A SHOWING OF NECESSITY SUFFICIENT TO JUSTIFY INFRINGEMENT ON APPELLANT'S RIGHT TO CONFRONTATION.

While the absence of the safeguards advanced by the confrontation clause "'calls into question the ultimate "integrity of the fact-finding process,"'" *Ohio* v. *Roberts*, 448 U.S. at 64, *quoting Chambers* v. *Mississippi*, 410 U.S. 284, 295 (1973), *quoting Berger* v. *California*, 393 U.S. 314, 315 (1969), the right to confront adverse witnesses is not absolute. The rights of confrontation and cross-examination, "however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case." *Mattox* v. *United States*, 156 U.S. at 243. *See also Ohio* v. *Roberts*, 448 U.S. at 64, *quoting Chambers* v. *Mississippi*, 410 U.S. at 295 ("competing interests, if

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[46] As the dissent pointed out in *Stincer*, "A defendant who represents himself is 'entitled to as much latitude in conducting his defense as we have held is enjoyed by counsel vigorously espousing a client's cause.'" *Kentucky* v. *Stincer*, 107 S.Ct. at 2671 (Marshall, J., dissenting) (citations omitted). The trial court's decision to impose a screening barrier created an unconstitutional dilemma for appellant: whether to continue to exercise his right to representation by counsel, and thus be placed behind the screening device, or to appear *pro se* so that he could move freely about the courtroom and confront his accusers face-to-face. *Id.* Appellant was compelled to choose between a fair trial and legal representation. The "forced choice between two fundamental constitutional guarantees is untenable." *Id.* (citing *Simmons* v. *United States*, 390 U.S. 377, 394 (1968)).

'closely examined,' may warrant dispensing with confrontation at trial").

The Iowa Supreme Court, however, expressly rejected appellant's argument that the trial court could not constitutionally permit the screen authorized by Iowa law absent a showing of necessity (J.A. 77). The court concluded that, in the confrontation clause context, the issue of necessity only "arises when a witness is unavailable for trial and a party seeks to introduce some prior statement or testimony of that witness." (J.A. 77). That conclusion is erroneous. The due process clause protects those liberties that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts*, 291 U.S. at 105. In *Pointer* v. *Texas*, 380 U.S. at 403, this Court recognized that the right of confrontation is a fundamental right. When a fundamental right is involved, the state may only infringe on that right where necessary to accomplish some compelling state interest, *Chambers* v. *Mississippi*, 410 U.S. at 295, and only to the extent necessary to meet that need. *Cf. Griswold* v. *Connecticut*, 381 U.S. 479, 485 (1965).

Lower courts that have reviewed sixth amendment challenges to criminal procedural reforms designed to protect child witnesses have closely scrutinized the trial record for clear evidence that the innovation would serve an essential state interest at that trial. In *Hochheiser* v. *Superior Court*, 161 Cal. App.3d 777, 208 Cal. Rptr. 273 (1984), for example, the court found that testimony by parents regarding the mental health of their children was legally insufficient to justify the use of closed circuit television during defendant's trial for lewd conduct with a minor. *Id.* at 793-94. *See also Long* v. *State*, 694 S.W.2d 185, 191 (Tex. App. 5 Dist. 1985) ("neither our record nor the legislative history contains evidence that the child was, or that sex-abuse victims generally are, emotionally

disturbed, reluctant to testify, or intimidated by the accused . . ."), *State* v. *Melendez*, 661 P.2d 654 (Ariz. 1982) (clinical psychologist's testimony of psychological harm); *State* v. *Warford*, 389 N.W.2d 575 (Neb. 1986) (no compelling need for use of televised testimony); *Commonwealth* v. *Willis*, 716 S.W.2d 224, 229-30 (Ky. 1986) ("If the prosecution is unable to show any necessity for use of the statute, it could be an abuse of discretion to grant a motion over defense objection"); *State* v. *Daniels*, 448 So.2d 941, 943 n.2 (La. App. 1 Cir. 1986) (". . . reasons and factual basis therefore should appear in the record").

The record in the present case is bereft of any evidence that use of a screening barrier at appellant's trial was necessary to accomplish some compelling state interest. There is no testimony or finding that the child witnesses were traumatized or would be harmed by testifying in appellant's presence.[47] The record, in fact, is silent as to

[47] The record, as a whole, provides no basis for concluding that N.C. and C.B. were "unavailable" to testify in appellant's presence. In *People* v. *Stritzenger*, 34 Cal.2d 505, 668 P2.d 738 (1983), the court held that in order to find that a witness is unavailable due to emotional distress or trauma, the potential psychological injury must make it "relatively impossible" for the witness to testify. *See also Warren* v. *United States*, 436 A.2d 821 (D.C. App. 1981) (suggesting factors for determination whether "relatively impossible" for child witness to testify on basis of alleged severe psychological injury). There was no finding and the trial record does not support the conclusion that it was "relatively impossible" for N.C. and C.B. to testify in appellant's presence. One commentator has flatly declared ". . . absence of live face to face confrontation between the defendant and a child witness who has not been shown to be unavailable to testify in the accused's presence violates the defendant's sixth amendment right to confront witnesses against him." Graham, *Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions*, 40 U. MIAMI L. REV. 19, 76 (1985); *see also* PROTECTING CHILD VICTIM/WITNESSES—SAMPLE LAWS AND MATERIALS, pp. 17-19 (sample statutes require findings on record of "unavailability" before use of procedural reforms).

any justification for infringement on appellant's right to confront adverse witnesses.

While this Court has recognized that "safeguarding the physical and psychological well-being of a minor" is a compelling state interest, *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. at 607, before a child victim is excused from testifying in the presence of the accused on the premise he or she will suffer additional injury, "the basis for such a premise must be established both in fact as well as in logic, and its dimensions must be spelled out in terms of its nature, degree and potential duration." *Hochheiser* v. *Superior Court*, 161 Cal. App.3d at 793, 208 Cal. Rptr. at 289; *cf. Globe Newspaper Co.* v. *Superior Court*, 457 U.S. at 607-09. As one commentator on the child witness stated:

> Psychiatric opinions and studies emphasize that each child victim reacts to an offense and its aftermath in his own individual way. A case of incest is different from indecent exposure, a stranger-aggressor different from an offender whom the child knows, use of force different from willing participation, etc. Thus, there can be no more justification for excusing all child victims from testifying than for imposing the duty on all of them. Each case merits its own individual decision.

Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977, 1009 (1969).

Since the state failed to demonstrate that use of a screening barrier at appellant's trial was necessary to an essential state interest, and since the trial court failed to consider the use of less prejudicial alternative arrangements, *infra*, pp. 22-31, infringement on appellant's right to confront adverse witnesses is constitutionally intolerable.

III.

THE VIOLATION OF APPELLANT'S RIGHT TO A FAIR TRIAL AND TO CONFRONT ADVERSE WITNESSES CAUSED BY THE USE OF A ONE-WAY SCREENING BARRIER AT TRIAL WAS NOT HARMLESS ERROR.

Infringement on appellant's right to a fair trial and to confront adverse witnesses by the placement of a screening device between him and complaining witnesses at trial requires automatic reversal, and should not be the subject of a harmless error analysis. Even if a harmless error test is employed, however, error in this case could not have been harmless beyond a reasonable doubt.

A.

A HARMLESS ERROR ANALYSIS SHOULD NOT BE MADE IN THIS CASE.

The constitutional rights that were violated by the placement of a one-way screening barrier, in court, between appellant and complaining witnesses are so fundamental to a fair trial, and the magnitude of the infringement on those rights was so great, that a harmless error analysis is inappropriate in this case. In *Chapman* v. *California*, 386 U.S. 18 (1967), this Court concluded that there might be "some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless," *Id.* at 22, but it expressly emphasized that "there are some constitutional rights so basic to a fair trial that their infraction can *never* be treated as harmless error." *Id.* at 23 (emphasis added).[48]

---

[48] The Court noted three illustrative cases where a harmless error analysis would be inappropriate: *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (right to counsel); *Payne* v. *Anderson*, 356 U.S. 560 (1958)

The bedrock of a fair trial in our system of criminal justice is the presumption of innocence. This Court has long ago stated:

> The principle that there is a presumption of innocence in favor of the accused is undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.

Coffin v. *United States*, 156 U.S. 432, 453 (1895).[49] A constitutional error, as in this case, that "led to an increased likelihood of the jury's finding of guilt even before any of the testimony, let alone all of it, had been heard," *Brewster* v. *Bordenkircher*, 745 F.2d at 918, simply cannot be cast aside as harmless. A courtroom arrangement or procedure that is inherently prejudicial, thus affecting consciously and subconsciously the attitudes of the jurors towards the accused, can never be harmless since, by definition, a court would be unable to declare "a belief that it was harmless beyond a reasonable doubt." *Chapman* v. *California*, 386 U.S. at 24; *see Brewster* v. *Bordenkircher*, 745 F.2d at 917-18 ("Only an error that does not prejudice can be deemed harmless"). Since the use of a one-way screening device at appellant's trial was inherently prejudicial, *infra* pp. 12-22, the resulting infringement on appellant's constitutional

(coerced confession); *Tumey* v. *Ohio*, 273 U.S. 510 (1927) (impartial judge). *Id.* at 23 n. 8. In a concurring opinion, Justice Stewart pointed out that the majority's list was not exhaustive, citing a long line of cases reversing convictions based on constitutional violations without considering whether they were harmless. *Id.* at 42-45 (Stewart, J., concurring).

[49] In *Coffin*, the Court traced the historical origins of the presumption of innocence from the book of Deuteronomy, through Greek and Roman Law, and into the tradition of English common law.

rights cannot be harmless as a matter of law. *Fahy* v. *Connecticut*, 375 U.S. 85, 91-92 (1963).

Similarly, the restriction on appellant's right to physically confront adverse witnesses was a "core" confrontation clause violation that should not be deemed harmless. *See Rushen* v. *Spain*, 464 U.S. 114, 129-30 n. 8 (1983) (per curiam) (Stevens, J., concurring). This Court has no means to measure the effect that a face-to-face meeting with appellant might have had on the testimony of N.C. and C.B. As this Court reiterated in *Delaware* v. *Van Arsdall*, 106 S.Ct. at 1437, "some constitutional errors . . . are so fundamental and pervasive that they require reversal without regard to the facts or circumstances of the particular case." Preventing a face-to-face confrontation in this case and thus restricting effective cross-examination of complaining witnesses was such a constitutional error.

B.

EVEN IF A HARMLESS ERROR ANALYSIS IS MADE, THE VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS COULD NOT HAVE BEEN HARMLESS BEYOND A REASONABLE DOUBT.

Before the Court can hold harmless a violation of federal constitutional rights, it must determine that the violation was harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. at 24. In *Fahy* v. *Connecticut*, 375 U.S. 85 (1963), this Court articulated the test for harmless constitutional error in terms of "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.* at 86-87. In *Chapman*, the Court required "the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict

obtained." *Chapman* v. *California*, 386 U.S. at 24. Under either formulation, to find harmless error here this Court must be convinced beyond a reasonable doubt that there was no rational possibility that the one-way screening barrier influenced the jury's verdict. That conclusion is untenable.

The one-way screening device was inherently prejudicial and its presence infected the entire trial. Its impact on the jury cannot be deemed harmless. Since there is no way of segregating the tainted portion of the record and determining its affect on the jury beyond a reasonable doubt, *see* Note, *Harmless Constitutional Error*, 83 HARVARD L. REV. 814, 821 (1970), the violations of appellant's rights cannot reasonably be found harmless as a matter of law. Without the critical testimony of N.C. and C.B., the state would not have established a prima facie case and appellant would have been entitled to a judgment of acquittal. *See* Iowa R. Crim. Pro. 18(8)(a).

Even if the Court considers the entire record, the case against appellant was not so overwhelming that it should conclude that the violations of appellant's rights under the sixth and fourteenth amendments were harmless beyond a reasonable doubt. *See Harrington* v. *California*, 395 U.S. 250, 254 (1969).

The only eyewitnesses to the assault could not identify their assailant (J.A. 19-20, 28-29, 31-32). The descriptions of the assailant given by N.C. and C.B. were inconsistent and varied in significant respects from the description of appellant. The girls testified that their assailant was a man of medium height with his hair in a ponytail (J.A. 20, 31-33, 35, 39, 45). Appellant was six-foot-three (J.A. 66) and wore his hair short (J.A. 64-66). Appellant never wore his hair in a ponytail (J.A. 64-66). The assailant wore a

traditional watch pushed high on his forearm (J.A. 32, 41). When arrested, appellant was wearing a digital watch (J.A. 60). Defense witnesses testified that appellant traditionally wore a digital watch (J.A. 64-66).

N.C. and C.B. testified that shortly after the assailant left the tent, they heard a nearby motorcycle start up and drive away (J.A. 20-21, 44, 46-47). In the investigation that followed the incident, the police were never able to account for that motorcycle (J.A. 62). Appellant did not own a motorcycle, nor had he operated one in Clinton, Iowa (J.A. 66-67).

The state also offered expert testimony that several hairs similar to appellant's were found on the bedding in the tent and on N.C.'s blue shorts (J.A. 50). On cross-examination, the expert testified that the similarities did not conclusively establish that the hairs came from appellant (Tr. 159). He further stated that five additional, unidentified hairs were found in the tent and that those hairs were dissimilar to the hair of appellant (J.A. 51).

Finally, the state offered evidence that in a search of appellant's residence police found a flashlight and a yellow cup that resembled items taken from the girls' tent (J.A. 59). Appellant testified that he found the flashlight and cup discarded at the corner of his driveway on the morning of August 3 (J.A. 67-68). He carried the items inside and threw the cup away (J.A. 67-68). The yellow cup was found by the police at the top of a trash container (J.A. 59). During the search of appellant's residence the police did not find: the mask worn by the assailant (J.A. 60-61); clothing matching that worn by the assailant (J.A. 60-61); or a pair of panties taken from the girls' tent (J.A. 60, 62-63). The record as a whole, thus, does not support a conclusion that the constitutional error in this case was harmless beyond a reasonable doubt.

Nor was the instruction given to the jury sufficient to mitigate the inherent prejudice of the screening device. The instruction, by alerting the jury to the novelty of the in-court arrangement, may have increased the prejudicial impact of the barrier. *See Dorman* v. *United States*, 140 U.S. App. D.C. 313, 327, 435 F.2d 385, 397 (1970) (greater danger of prejudice if jury aware arrangements are extraordinary). Furthermore, the Iowa Supreme Court properly recognized in this case that "[b]ecause inherently prejudicial practices may influence a jury subconsciously, a court cannot always assume cautionary instructions will be sufficient to prevent prejudice." (J.A. 78). *Cf. Holbrook* v. *Flynn*, 106 S. Ct. at 1347 ("jurors will not necessarily be fully conscious of the effect [that an inherently prejudicial practice] will have on their attitude toward the accused"). Available empirical data suggests instructing the jury to ignore the screening barrier may have been, in fact, counterproductive. *See* L. Wrightsman, PSYCHOLOGY AND THE LEGAL SYSTEM, p. 250 (1987); Wegner, Schneider, Corter, and White, *Paradoxical Effects of Thought Suppression*, 58 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY, 5-13 (1984).[50]

[50] In the Wrightsman text, the author points out that most empirical data indicates not only that a judge's admonition to the jury to disregard inadmissible evidence may be ineffective, but that the instruction may boomerang. Jury instructions may serve to sensitize the jurors to inadmissible evidence, or, in terms of reactance theory, may influence verdicts *in the direction* of that inadmissible evidence. The author concludes that "the pattern of findings makes us very suspicious of an assumption that jurors are able to disregard inadmissible evidence, especially when such evidence would lead to conviction of the defendant." Wrightsman, *supra*, at 150 (citations omitted).

In the Wegner et al. article, the authors describe an experiment where subjects verbalizing the stream of consciousness for a five-minute period were asked to try not to think of a white bear during that period, but to ring a bell if they did. Subjects were unable to suppress the thought as instructed. When asked, after this suppression exercise, to think about a white bear for five minutes, the subjects showed significantly more tokens of thought about a bear than did subjects asked to think about a white bear from the outset. The authors concluded that attempted thought suppression may have paradoxical effects, perhaps even producing an obsession or preoccupation with the suppressed thought.

The judge's instruction in the present case (J.A. 17), in addition to pointing out the novelty of the screening device, expressly brought to the jury's attention the suggestion that the screening device could be considered evidence of appellant's guilt.

CONCLUSION

For the reasons stated herein, appellant respectfully requests that the judgment of the Iowa Supreme Court be reversed and that Iowa Code § 910A.3, as construed and applied in this case, be declared unconstitutional. Given the inherent difficulties of a *nunc pro tunc* determination of whether use of the screening barrier at appellant's trial was necessary to accomplish some compelling state interest, *see Drope* v. *Missouri*, 420 U.S. at 183, this Court should reverse and remand for a new trial.

Respecfully submitted,

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APPENDIX

APPELLANT'S APPENDIX A

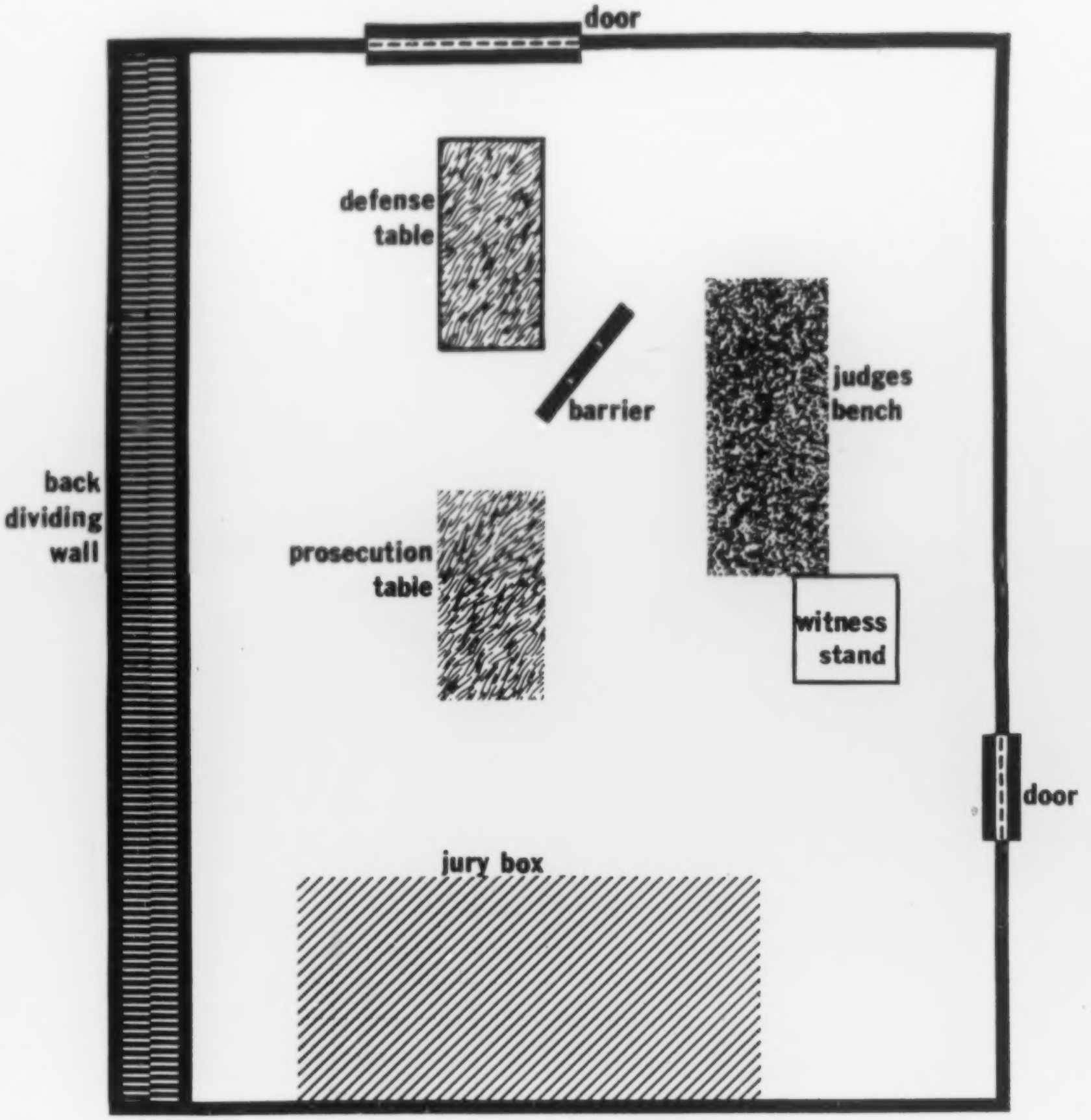
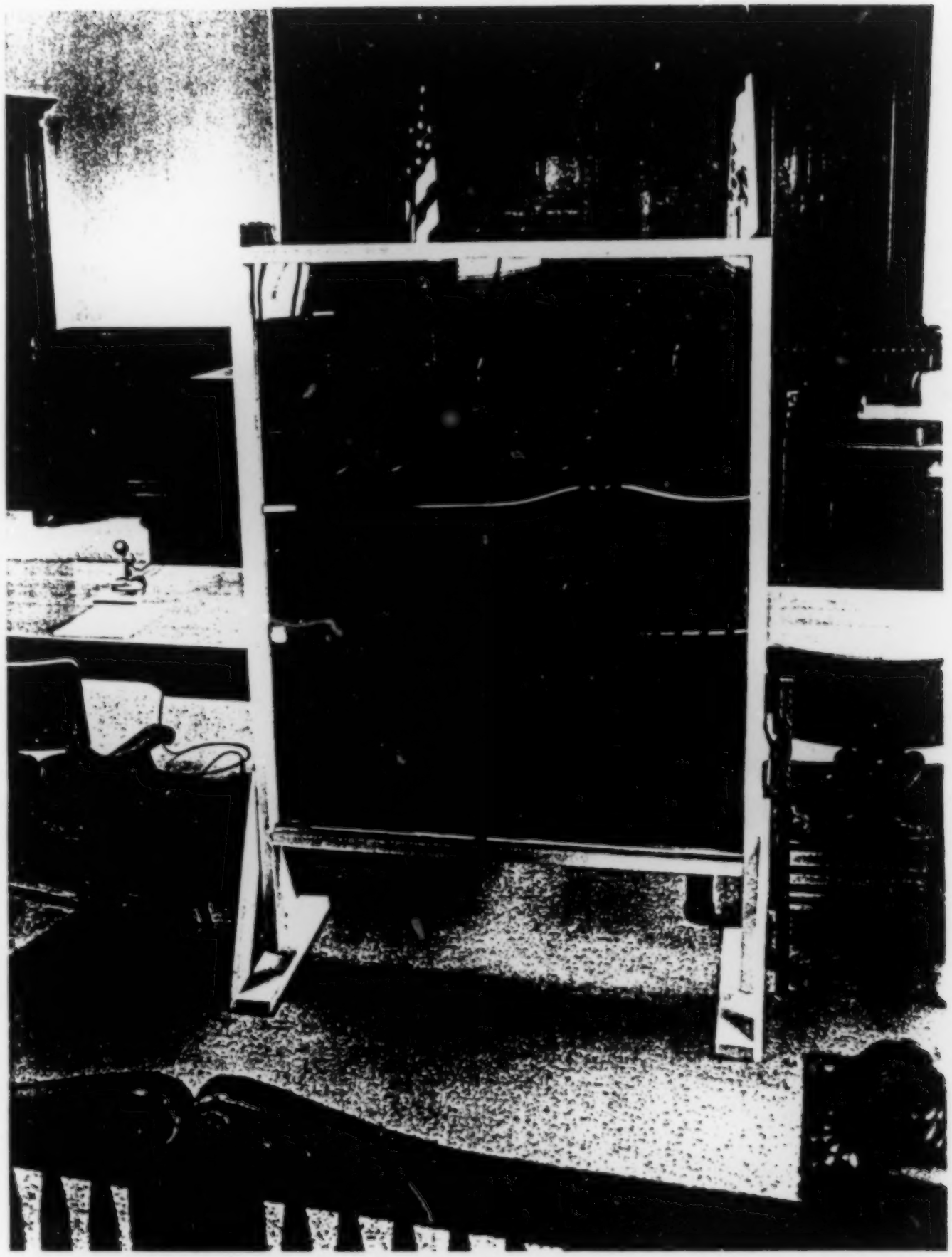


DIAGRAM 1

Approximate Scale Drawing of Clinton County Courtroom at time of Coy Trial



PHOTOGRAPH 1. This photograph shows the one-way screening barrier used at appellant's trial in a lighted courtroom. The dimensions of the structure are 73" x 50". The dimensions of the one-way mirror are 57" x 47".

PHOTOGRAPH 2. This photograph shows the one-way screening barrier from the jury box in a lighted courtroom.

PHOTOGRAPH 3. This photograph shows the one-way screening barrier from behind the witness chair in a lighted courtroom.

PHOTOGRAPH 4. This photograph shows the one-way screening barrier in the lighted courtroom generally.

APPELLEE'S

BRIEF

Supreme Court, U.S.
FILED
NOV 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-6757

In The
Supreme Court of the United States
October Term, 1987

JOHN AVERY COY,
Appellant,

vs.

STATE OF IOWA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF IOWA

BRIEF FOR THE APPELLEE

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether a state trial court may, consistent with due process, protect young girls from courtroom traumatization through the use of a one-way mirror as authorized by state law in the trial of a defendant accused of sexually abusing the young girls, where the screen was unobtrusive, was used only while the girls testified, did not obstruct the jury's view of the girls or the defendant, did not obstruct the view of the girls by the defendant and his counsel while the girls testified, and where the jury received clear and concise instructions from the state trial court not to draw any inference of guilt from the use of the screen.

Whether a criminal defendant charged with lascivious acts with two children may utilize the confrontation clause of the sixth amendment to the Constitution of the United States to compel eye-to-eye contact with the child victim during their in-person testimony in front of the jury, even though no limitations are placed upon the defendant's right to cross-examine.

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ARGUMENT:

I. Limited Courtroom Use Under Careful Court Supervision of a One-Way Mirror to Shield the Child Victims from the Glare of Their Accused Molester Comports with Due Process. ____ 7

A. Because the limited, judicially supervised use of the one-way mirror did not brand or stigmatize the accused, the procedure was not "inherently prejudicial." ____ 8

1. The jury reasonably could have drawn numerous, nonincriminating inferences from the limited, judicially supervised use of the one-way mirror. ____ 9

2. The jury was encouraged to draw nonincriminating inferences from the limited, judicially supervised use of the one-way mirror by the trial court's clear and concise instructions. ____ 11

B. Even if the limited, judicially supervised use of the one-way mirror could somehow be considered "inherently prejudicial," the procedure generally comports with due process because it promotes the essential state interest of protecting child witnesses from harmful trauma that could otherwise occur in the courtroom. ____ 13

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1. It is universally recognized that children can be harmed by eyeball to eyeball glares of accused molesters. ____ 13

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C. The petitioner has not made any unusual showing of prejudice sufficient to outweigh the state's interest in protecting child victims of sexual molestation. ____ 18

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II. The Petitioner's Sixth Amendment Right to Confrontation Does Not Include the Right to Force His Glare Upon the Victims of Sexual Abuse in a Criminal Trial. ____ 23

A. The sixth amendment confrontation clause guarantees a right to meaningful cross-examination, not the right to further traumatize the victim of sexual abuse. ____ 24

B. Even if sixth amendment values are implicated in this case, the right of the defendant is outweighed by the necessity of protecting victims of sexual abuse from further injury. 30

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No. 86-6757

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ON APPEAL FROM THE SUPREME COURT OF IOWA

BRIEF FOR THE APPELLEE

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 6 of the United States Constitution, the Confrontation Clause provides that:

> In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him. . . .

Iowa Code section 910A.3 was transferred in 1987 Iowa Code to section 910A.14. Act of May 5, 1986, ch. 1178

§ 19, 1986 Iowa Acts 246. Section 910A.3 (Supp. 1985) reads as follows:

> 1. A court may, upon its own motion or upon motion of any party, order that the testimony of a child, as defined in section 702.5, be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court. Only the judge, parties, counsel, persons necessary to operate the equipment, and any person whose presence, in the opinion of the court, would contribute to the welfare and well-being of the child may be present in the room with the child during the child's testimony.
>
> The court may require a party be confined to an adjacent room or behind a screen or mirror that permits the party to see and hear the child during the child's testimony, but does not allow the child to see or hear the party. However, if a party is so confined, the court shall take measures to insure that the party and counsel can confer during the testimony and shall inform the child that the party can see and hear the child during testimony.
>
> 2. The court may upon motion of a party order that the testimony of a child, as defined in section 702.5, be taken by recorded deposition for use at trial, pursuant to rule of criminal procedure 12(2)(b).
>
> 3. The court may upon motion of a party admit into evidence the recorded statements of a child, as defined in section 702.5, describing sexual contact performed with or on the child, not otherwise admissible in evidence by statute or court rule if the court determines that the recorded statements substantially comport with the requirements for admission under Iowa rules of evidence 803(24) or 804(5).

———o———

STATEMENT OF THE CASE

Facts

On the afternoon of August 2, 1985, thirteen-year-old C.B. threw some blankets over two Ping-Pong tables to make a "tent" a few feet from the back door of her home in a residential neighborhood. Trial Tr. p. 73. The home was surrounded almost entirely by trees. The tent was not visible from the street, but was visible from the neighboring home where Coy was living with his girlfriend. Trial Tr. p. 302, 314. Coy watched C.B. build the tent while he sat in a lawn chair in his back yard. Trial Tr. p. 314. C.B.'s father thought it was unusual to see Coy there.

At about 9:00 p.m., C.B. and her friend, thirteen-year-old N.C., took sleeping bags, pillows, a flashlight, cookies, two cups, soda pop and a game to the tent for a camp-out. Trial Tr. pp. 38-39. The girls went to sleep about 10:00-11:00 p.m. Trial Tr. pp. 41, 80. Sometime during the night, the girls were awakened when Coy crawled into the tent. Trial Tr. p. 41.

Coy grabbed the girls by the throat, and said, "Don't scream or I'll knock you out." Trial Tr. pp. 41, 80. He said he was surprised to find more than one girl there. Trial Tr. pp. 41, 81. Coy asked if the girls were virgins and then ordered the girls to remove all of their clothes but their underwear. Trial Tr. pp. 42, 81. He fondled their breasts and vaginal area. Trial Tr. pp. 42, 82. He took off their underwear and put them into a white bag that he had brought with him. Trial Tr. pp. 42, 83. He fondled

the girls again, kissed them on their cheeks and lips and removed his own clothing. Trial Tr. pp. 43, 82.

Coy ordered the girls to suck on his penis, and they complied. Trial Tr. pp. 43, 84. He ordered the girls to kiss each other and act like they were enjoying it. Trial Tr. pp. 43, 90. They feigned compliance. Trial Tr. pp. 43, 90. When Coy ordered the girls to urinate in his face, they told him they did not have to go to the bathroom. Trial Tr. pp. 44, 84-85. He urinated into a cup. Trial Tr. pp. 44, 85. Coy laid down between the two girls and tried to think of a way to leave without alerting anyone. Trial Tr. p. 85.

He warned the girls that if they ever told anyone what had happened, they would go through a lot. Trial Tr. pp. 46, 85. He forced the girls to lie down on their stomachs, tied them with their sweatpants and warned them that he would be right back. Trial Tr. pp. 45, 85. He never returned. After about 15 minutes, the girls untied themselves and went into the house to report the incident to C.B.'s parents at about 6:00 a.m. Trial Tr. pp. 45, 58, 86.

C.B.'s parents called the police and took the girls to the hospital for an examination. Trial Tr. pp. 49, 90. C.B.'s father alerted police that he suspected Coy as the perpetrator because only Coy had a vantage point to see the tent. Supp. Tr. p. 56, Trial Tr. pp. 169, 176. Coy was arrested on an unrelated charge. Trial Tr. p. 197. He was wearing a wrist watch, pushed midway up his arm, with the face of the watch turned inward. Trial Tr. p. 197.

The girls' description of Coy was limited by the fact that it was dark, he shined a flashlight in their eyes and

he warned them not to look at him. Trial Tr. pp. 46-47, 87. The girls said that he appeared to be tall and muscular, with a deep, low voice. Trial Tr. pp. 47, 52, 86, 90. He was wearing a watch midway up his arm, with the face turned inward. Trial Tr. pp. 48, 87. The girls could not describe his facial features because he appeared to be wearing a nylon stocking over his head, with the nylon cut off at the back and tied to look like a ponytail or braid. Trial Tr. pp. 48-49, 52, 59, 60, 86, 88, 89, 96-97.

The physical evidence linking Coy to the crime included (1) the girls' flashlight with Coy's fingerprints, found in Coy's garage, Trial Tr. p. 199; (2) the batteries from the flashlight, found several feet away in Coy's garage, Trial Tr. pp. 199; (3) the yellow cup into which the assailant urinated, found in the garbage just inside Coy's back door, Trial Tr. pp. 200-201; (4) pubic hairs, unlike the girls' pubic hairs, found in the girls' bedding, Trial Tr. pp. 139, 146; (5) one head hair similar to Coy's head hairs, and unlike the victims' head hairs, found in the girls' shorts. Trial Tr. pp. 141, 149.

SUMMARY OF THE ARGUMENT

Not every practice tending to single out the defendant from others in the courtroom can be eliminated. *Holbrook v. Flynn*, 475 U.S. 560, 106 S. Ct. 1340, 1345 (1986). The Iowa statute under challenge grants discretion to the trial court to select non-traditional methods of receiving child victims' testimony, based upon the legislative acknowledgement of a universal belief that the criminal proc-

ess must treat those victims with compassion. The need to protect child victims from further psychological trauma is a compelling one. *Globe Newspaper Company v. Superior Court*, 457 U.S. 596, 607 (1982). This essential state interest justified the very limited use of the one-way mirror under careful court supervision in the context of this case. Because its use did not stigmatize the accused, its use was not inherently prejudicial. The jury was encouraged to draw nonincriminating inferences by clear instructions from the court.

State trial courts need breathing room in fashioning procedures that accommodate the competing interests of the state, the accused and child witnesses.

In deference to the interests of the defendant, the use of the one-way mirror was strictly limited and was explained to the jury, encouraging them to draw a wide range of inferences. It is not the inherently prejudicial analog of shackles and prison garb. Defendant has not made any showing of unusual circumstances sufficient to outweigh the State's interest. Due process allows flexible responses to competing values. Although the trial court did not reduce its analysis to a formal order, a reviewing court can examine this record and approve the trial court's consideration of the age of the victims, nature of the crime and interests of the parents.

Defendant's right to confront his accusers refers to their personal appearance before the jury under oath, subject to the defendant's opportunity to cross-examine. *California v. Green*, 399 U.S. 149 (1970). Defendant asserts an additional component: eye-to-eye confrontation. That alone was denied by the trial court. The principal fo-

cus is on the opportunity to cross-examine, *Kentucky v. Stincer*, 107 S. Ct. 2658 (1987) which defense counsel pursued fully and without limitation.

Coy's marginal interest in forcing the victims to meet his gaze is secondary to the essential and competing policy of the state to protect victims from further abuse. The trial court had personal knowledge of those competing considerations, readily discernible from the record. While express findings may have been preferable, any failure to make express findings under the circumstances of this case is harmless error.

This court should decline to intervene in the various states' selections of appropriate responses to, and safeguards for, competing interests absent clear constitutional deficiencies. The specific procedure used here is not deficient.

ARGUMENT

I. LIMITED COURTROOM USE UNDER CAREFUL COURT SUPERVISION OF A ONE-WAY MIRROR TO SHIELD THE CHILD VICTIMS FROM THE GLARE OF THEIR ACCUSED MOLESTER COMPORTS WITH DUE PROCESS.

Due process requires that the determination of guilt rest on evidence adduced at trial, as opposed to non-evidentiary circumstances. *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978). "This does not mean, however, that every practice tending to single out the accused from everyone

else in the courtroom must be struck down." *Holbrook v. Flynn*, 475 U.S. 560, 106 S. Ct. 1340, 1345 (1986). Because defendant's mere presence at trial to answer criminal charges may suggest guilt, *id.*, it is plainly impossible to rid the jury trial process of all such implications.

The due process analysis applied to claims that certain courtroom procedures violate due process is straightforward. Even if the procedure is deemed "inherently prejudicial," it may be justified if it promotes an "essential state policy." *Id.* citing *Estelle v. Williams*, 425 U.S. 501, 503, 504 (1976). If the activity is not inherently prejudicial, the defendant is not generally entitled to relief.

A. Because The Limited, Judicially Supervised Use Of The One-Way Mirror Did Not Brand Or Stigmatize The Accused, The Procedure Was Not "Inherently Prejudicial."

A practice is inherently prejudicial when "reason, principle and common human experience" dictate that a particular practice gives rise to an unmistakable brand of guilt or creates an unacceptable risk, incurable by cautionary instructions, that the jury will improperly base its decision. *Estelle v. Williams*, 425 U.S. at 504. "Inherently prejudicial" practices admit few inferences save defendant's guilt. From the use of shackles or leg irons, the jury necessarily infers that the defendant is a danger to the court or the community. *Id.* at 505. Likewise, prison garb telegraphs to the jury that the defendant has been jailed, either because of danger or indigence.

The use of a one-way mirror does not rise to the level of an "inherently prejudicial" practice; it does not convey

an unmistakable message which inexorably points to the defendant's guilt. The most likely inference is of the implementation of a law requiring the screen. The trial court here encouraged this inference in its instruction to the jury and admonished the jury that "in the plainest language, that is not evidence of the defendant's guilt." J.A. 17.[1]

Even if the jury speculated further, one obvious inference to be drawn was not of the defendant's guilt but rather of a concern for child witnesses. In the context of this case a one-way mirror is not the kind of apparatus from which the jurors' common sense, logic, and life experience dictate an "unmistakable brand" of guilt. It is no more suggestive than having him stand trial at all, or remain at the defense table after an in-court identification.

1. The jury reasonably could have drawn numerous, nonincriminating inferences from the limited, judicially supervised use of the one-way mirror.

The one-way mirror was set up in the courtroom only during the testimony of the two victims: two of the fourteen witnesses who appeared. The children gave their testimony only during one morning of a four-day trial.

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[1]If any prejudicial inference might have been drawn, it flowed not from the limited use of the mirror, nor the cautionary instruction, but from defense counsel's objection to the screen in the presence of the jury, not once but twice, (J.A. 18, 22), which effectively negated the Court's explanation that the screen was legislatively mandated for all children in all cases. If out of the ordinary, it was declared so by counsel. Similarly, defense counsel did not ask that the screen be removed, for tactical reasons it is assumed, even though trial court specifically acknowledged that possibility. J.A. 17. Cf. *Dorman v. United States*, 140 U.S. App. D.C. 313, 327, 435 F.2d 385, 397 (1970) (greater danger of prejudice if jury aware that arrangements are extraordinary).

The position of the mirror was carefully chosen in order to lessen its intrusiveness. It only affected the victims' ability to see the defendant while they testified. The defendant could observe the victims while they testified; the jury could simultaneously see counsel, judge and most importantly, the defendant and the witness; defense counsel could see the victims and they him;[2] and the judge could see everybody.

The courtroom lights were dimmed while the mirror was used. Coy suggests that the darkened courtroom, the size of the mirror and the placement of the mirror were irreparably inflammatory. The record does not reflect the angle of the mirror or its placement, the location of the defense tables or other variables that could create prejudice.[3] Courts have often allowed prosecutors to use slides, films or videotapes in the presentation of evidence, and

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[2]Coy suggests that it was impossible for defense counsel to see the victims while they testified. Yet the trial court gave counsel the opportunity to move wherever he "felt it necessary to perform his function." J.A. 5.

[3]Coy has failed to show that his "re-creation" of the courtroom in the photographs and diagram appended to his brief accurately reflects the actual courtroom appearance at the time the victims testified. The true impact of the mirror would depend on the relative location of the mirror, the witness, the jurors and the counsel tables and the overall size of the courtroom, which variables were all assessed and approved by the trial court. None of those factors can be accurately reflected in the photographs or diagrams with which Coy has supplemented the record.

His hyperbole that the mirror evokes images of a "gallows" is contradicted by the photographs he provides. The mirror is more akin to the bulletin board standing in the corner of the courtroom in photograph number 4.

the courtroom must be darkened for effective use of this audio-visual equipment. No "unmistakable brand of guilt" could be drawn from a courtroom darkened for that purpose.

Coy urges that the use of the mirror affects the fact-finding function of the jury because, like the use of a prisoner's dock, it focuses on the defendant and labels him as different and dangerous.[4] On the contrary, the focus is on the victims. The mirror was used only during the victims' testimony. The jury was unlikely to conclude that Coy was dangerous when he sat passively in the courtroom throughout the trial,[5] and when he sat behind the mirror only when the victims testified. The limited use of the mirror with cautionary instructions foils the attempted analogy.

2. The jury was encouraged to draw nonincriminating inferences from the limited, judicially supervised use of the one-way mirror by the trial court's clear and concise instructions.

The trial court explained to the jury at the first opportunity and again in its instructions at the end of trial

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[4]In *Young v. Callahan*, 700 F.2d 32 (1st Cir. 1983), the First Circuit Court of Appeals refused to declare the prisoner's dock *per se* unconstitutional. Absent a showing of necessity for security purposes, the dock is unconstitutional as it " 'focuses attention on the accused and may create the impression that he is somehow different or dangerous.' " *Id.* at 34, quoting *Walker v. Butterworth*, 599 F.2d 1074, 1080 (1st Cir. 1979). Like prisoner's garb, the dock is a *"constant reminder of the accused's condition."* (emphasis added) *Id.* at 35.

[5]Other adult witnesses testified adversely to Coy as well. In particular, one victim's father was clearly hostile. This reinforced the trial court's contemporaneous explanation that the mirror was used only for child witnesses, according to legislative mandate.

that the mirror was used because of a recent law passed by the Iowa legislature "which provides for this sort of procedure in cases involving children." J.A. 17. The clear implication is that use of a mirror is neither an unusual occurrence, nor a reflection on the defendant. In fact, the court specifically instructed the jury "to draw no inference of any kind" from having the mirror in the courtroom. J.A. 17.

The jury was left to infer that the mirror was used, not only in this case but in all cases, because of a legislative decision to treat child witnesses differently from adult witnesses. The court did not comment on the wisdom of this legislative decision, but merely stated what the law required.

After the Court's explanation, the use of the mirror said more about the child victims than it did about the defendant. If, as Coy hypothesizes, the mirror creates a "dramatic effect," this "dramatic effect" detracts from the victim's testimony by focusing the jury's attention on the mirror rather than on the substance of the child's testimony.[6] The mirror, in fact, may be more damaging to the prosecution than the defense. The jury could just as easily conclude that the child is overdramatizing or fantasizing the allegations, and that a truthful child would be willing and able to make face-to-face allegations. This is in sharp contrast to shackles or leg irons, which reflect badly only on the accused.

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[6]Indeed, this may well be the reason that the prosecutor requested the use of closed-circuit television rather than the use of the one-way mirror in the courtroom, based on the theory that jurors could be very comfortable watching a television screen.

B. Even If The Limited, Judicially Supervised Use Of The One-Way Mirror Could Somehow Be Considered "Inherently Prejudicial," The Procedure Generally Comports With Due Process Because It Promotes The Essential State Interest Of Protecting Child Witnesses From Harmful Trauma That Could Otherwise Occur In The Courtroom.

The due process analysis does not end upon a finding that the use of the one-way mirror is "inherently prejudicial." Reversal is not required where the State has shown a distinct need for, "an essential state interest" in, the inherently prejudicial practice which is, on balance, more compelling than the rights asserted by the defendant. *See, e.g., Estelle v. Williams*, 425 U.S. 501, 503 (1976); *Illinois v. Allen*, 397 U.S. 337, 344 (1970). Such a need is present here.

1. It is universally recognized that children can be harmed by eyeball to eyeball glares of accused molesters.

In enacting the challenged statute, the Iowa legislature stated its purpose: to "assure the fair and compassionate treatment of victims" and to "protect them from intimidation and further injury, [and] assist them in overcoming emotional and economic hardships resulting from criminal acts. . ." 1986 Iowa Acts. ch. 1178.

Courts and commentators[7] have recognized the trauma that child victims suffer when testifying in court. *See,*

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[7]Empirical research on the effects of courtroom appearances on child victims is in its infancy. The briefs of Amici fully catalogue and eloquently discuss the results of that research and commentary.

e.g., State v. Cooper, 353 S.E.2d 451, 454-455 (S.C. 1987) (citing "nationwide concern" for child sex abuse victims); *Commonwealth v. Willis*, 716 S.W.2d 224, 227 (Ky. 1986) (courtroom testimony "can be one of the most intimidating and stressful aspects of the legal process for children"); *People v. Algarin*, 129 Misc.2d 1016, 498 N.Y.S.2d 977, 978, 982-983 (1986) (citing research and commentary); *State v. Vigil*, 103 N.M. 583, 711 P.2d 28, 30-31 (1985) ("strong public policy" to protect child sex abuse victims from "the further trauma of in-court testimony"); *State v. Sheppard*, 197 N.J. Super. 411, 484 A.2d 1330, 1334-1337 (1984) (outlining traumatic effects on children); *State v. Gilbert*, 102 Wis. 2d 501, 326 N.W.2d 744, 750-751 (1982) (noting judicial concern for child welfare).

Recent reports suggest that one-third of child victims are under age 6, with the average age somewhat higher. Bulkley, *Evidentiary and Procedural Trends in State Legislature and Other Emerging Legal Issues in Child Sexual Abuse Cases*, 89 Dickinson L. Rev. 645, 647 (1985). The chair of the President's Task Force on Victims of Crime described the neglect of these young victims as a "national disgrace." Final Report, December 1982 at vii. The need for reform and compassionate treatment has been recognized by the American Bar Association,[8] the National Conference of the Judiciary on the Rights of Victims of Crime,[9] the National Council of Juvenile and Family Court

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[8]American Bar Association, *Guidelines for the Fair Treatment of Child Witnesses in Cases Where Child Abuse is Alleged* (1985) [hereinafter cited as *ABA Guidelines*].

[9]The National Institute of Justice, *Statement of Recommended Judicial Practices* (1983).

Judges[10] and the United States Attorney General's Advisory Board.[11]

The greatest need is at the point of greatest fear: facing the defendant.[12] "Whether the courtroom experience is traumatic or therapeutic depends in large measure on the attitude of the court itself toward modifying the proceedings."[13]

This Court has recognized that the need for "safeguarding the physical and psychological well-being of a minor is a compelling one." *Globe Newspaper Company v. Superior Court*, 457 U.S. 596, 607 (1982). "If, as psychologists report, the courtroom experience in such cases is almost as traumatic as the crime itself,[14] a state should certainly be able to take whatever reasonable steps it believes are necessary to reduce the trauma." *Id.* at 619 (Burger, C.J., dissenting). Clearly, a distinct need has been shown to justify the use of the one-way mirror here.

Coy concedes that children are likely to suffer trauma in testifying at trial. Nevertheless, he advances that

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[10]Metropolitan Court Judges Committee Report, *Deprived Children: A Judicial Response, 73 Recommendations* (August 1986).

[11]U.S. Department of Justice, Report and Recommendations to the President and Congress, *America's Missing and Exploited Children: Their Safety and Their Future* (1986).

[12]U.S. Department of Justice, *When the Victim is a Child* (1985).

[13]ABA *Guidelines* at 19, n.11.

[14]See Bohmer & Blumberg, *Twice Traumatized: The Rape Victim and the Court*, 58 Judicature 390 (1975).

Globe Newspaper requires the prosecution to show a compelling state interest in order to avoid violence to due process by using the one-way mirror. The standard adopted in *Globe* is inapplicable here. It is easily distinguishable (1) because of the unique status of first amendment protections and (2) because it dealt with closure of a trial, rather than regulation of courtroom procedure. *Id.* at 603-604. Where the public's right of access to trial is not implicated, the state's interest in advancing the protectionary measure is sufficient upon a legislative determination as here, that the protection was required.

2. State trial courts need breathing room in fashioning procedures that accommodate the competing interests of the accused and child witnesses.

The State submits that the due process analysis is complete upon the finding that the statute describes a "distinct need" common to all cases of young sex abuse victims.

Coy's demand that the prosecution show a need particular to him flows from an unwarranted assumption. Coy starts with the proposition that there is *no* trauma to the child victim. He argues that the State then must show necessity on a case by case basis.

The accepted reality, recognized by the Iowa legislature, is just the opposite. Trauma is determined to be the norm and the trial judge is left with the discretion to assess the severity and how best to accommodate competing interests. Due process requires a balance. Coy attempts to tip the balance in his favor. However, even if due

process requires a further, particularized showing of need prior to the use of the mirror, the record shows satisfaction of this burden.

Coy cites as appropriate factors for demonstration of particularized need: "the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim and the interests of parents and relatives." Appellant's Brief p. 23. The trial court judge, having presided at all pretrial hearings and proceedings, had substantial information regarding each of these factors. The judge knew that the victims were 13-year-old girls. J.A. 3. He knew the substantive claims made by the victims as revealed during the hearing on suppression motions. Testimony there, consistent with the testimony at trial, demonstrated that the victims possessed the average and expected psychological maturity of 13-year-old children. It also fully revealed the abhorrent and egregious nature of the acts committed against them. The trial judge knew that the victims were uneasy about testifying, which defense counsel acknowledged at trial. J.A. 11. Finally, the judge could reasonably infer from the hostility of one victim's father that the parents were interested in shielding the children from the defendant.

Although the trial judge did not specificially enumerate each of the factors Coy cites, from the evidence before the judge, the reviewing court can readily ascertain what factors were considered and the impact of each in the final decision. That the procedure was not as formalized as Coy urges does not concede the incorrectness of the result or that the very balancing process suggested by Coy was not followed.

In advancing his formal approach to the consideration and balancing of relevant factors, Coy claims that the mirror was not necessary because the children could not identify him as the perpetrator. His apparent logic is that if the children could not identify him as their attacker, little was to be gained from shielding their eyes from his.[15] Coy's analysis fails to take into account the circumstances of the physical and emotional violation of these children. The victims were "camping out" in a makeshift tent in their own back yard, just steps from their own home and parents. They felt secure in that knowledge and that location. That perceived physical and emotional security was invaded and destroyed. Coy grabbed the girls by the throat, threatened them if they screamed, and warned these children that they would suffer if they reported the attack to anyone. We cannot reasonably expect the children to be less threatened, afraid, or traumatized while reporting the attack to the jury, merely because they could not recognize Coy behind his mask. The need to protect testifying children does not cease upon their inability to identify the attacker.

C. The Petitioner Has Not Made Any Unusual Showing Of Prejudice Sufficient To Outweigh The State's Interest In Protecting Child Victims Of Sexual Molestation.

The use of the mirror in the circumstances of this case carries a constitutionally insignificant risk that the

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[15]As the Amicus points out, this argument actually cuts the other way on the inherent prejudice of the mirror. "So long as the screen is seen by the jury as just something that is done," there is no basis for believing that the screen is for this particular defendant. Brief of Amicus, Kentucky, at 19.

factfinding process has been affected; at most, it was a tolerable risk. The analysis should end there. Coy cannot show any extraordinary set of facts sufficient to outweigh the state's interest.

The evidence of Coy's guilt was overwhelming. One victim's father saw Coy watching one of the child victims as she set up her tent in the heavily wooded back yard, visible only from Coy's home. When Coy entered the tent, he was surprised to find two victims instead of one. Coy matched the general physical description of the assailant given by the victims. The assailant wore his watch midway up his arm, with the face turned inward, just as Coy wore his watch when he was arrested a few hours after the crime. Head and pubic hairs matching Coy's (but not the victims') were found in the victims' bedding and clothes. The girls' distinctive flashlight was found in Coy's garage, a few feet from the batteries from that flashlight. A yellow cup smelling of urine was found in the trash can just inside Coy's back door.

The mirror's use was limited as to time and place so as to minimize any prejudicial effect. *See supra*, pp. 9-10.

Defendant's other claims bearing on allegedly extraordinary circumstances are equally without merit.[16] Coy

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[16]Coy also makes a vague allegation that his right to counsel was impaired by counsel's "restricted access" to Coy. Appellant's Brief at 40. Counsel was free to move anywhere he needed to move during the victims' testimony. There was in fact no restriction on counsel's interaction with Coy. This "right to counsel" argument must be reviewed only as support for the

(Continued on following page)

suggests that he was immobile behind the mirror. Defendants do not normally roam freely in the courtroom during trial. The seating of the defendant at the usual place, at the defense table, was obviously not prejudicial. The same may be said for defense counsel's ability to roam freely "within the rail." Under Iowa courtroom protocol, the parties and their counsel usually remain seated at counsel table during all examination of witnesses. Iowa District Court Local Rules of Practice and Procedure, Seventh District, Rule 3.2. Coy's counsel was given the special privilege to move wherever he chose and to make whatever additional impact he might desire by that movement.

Coy's claim of error from the trial court's failure to consider other alternatives is unsupported. Iowa Code section 910A.3 offers the trial court discretion to consider several alternative protective measures or none at all. Each alternative has its assets and liabilities, its ad

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allegations of due process violations. As an independent ground for review, the issue was not raised in the Court below, and Coy was not the prevailing party. The following from *Kentucky v. Stincer*, 107 S. Ct. 2658, 2668 n.22 (1987) is appropriate:

> "the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below." *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940); *see also Heckler v. Campbell*, 461 U.S. 458, 468 n.12 (1983) (Court will consider ground not presented to federal court below only "in exceptional cases"). Because the judgment here is that of a state court, and because we do not believe that respondent's claim of deprival of the effective assistance of counsel qualifies as an exceptional case, we decline to review this claim.

vocates and detractors.[17] Placing the defendant in another room while the victim testifies may signal the defendant's dangerousness. Placing the victim in another room may discredit or diminish the child's veracity. Placing a mirror in the courtroom physically changes the courtroom[18] but it does not signal the defendant's dangerousness nor the child's lack of veracity.

In this case, the prosecution requested use of closed-circuit television (J.A. 2). The court concluded that, to maximize the range of inferences to be drawn by the jury, the mirror was the best way to accommodate the defendant's interests, the child's interests and the state's interests. The mirror reduced what the court considered the more "unnatural" (J.A. 6) effect of closed-circuit television, and it permitted the jury to view the victims in person during their testimony.[19] The defendant was not shut-

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[17]As this Court noted in *Miranda v. Arizona*, 384 U.S. 436, 490 (1964), federal and state legislatures should be "free to develop their own safeguards," so long as they do not violate a defendant's constitutional rights.

[18]The Wisconsin Supreme Court, recognizing that the prosecutor "faces the dilemma of letting the defendant go free or doing harm to the emotional well-being of the child-victim by compelling her testimony," suggested that courts have the inherent power—independent of legislative authorization—to "alter courtroom procedures to protect the emotional well-being of the child witness." *State v. Gilbert*, 326 N.W.2d at 752, 102 Wis. 2d at 518.

[19]Coy's position on appeal appears to be to second-guess the trial court's assessment. Coy now suggests the use of other alternatives, such as testimony by deposition or videotape or use of a "child-courtroom." Appellant's Brief at 19. He fails to explain why these alternative procedures would not also serve to single him out as different or dangerous or why even they were resisted at the trial stage when suggested by the prosecution. Most significantly, his apparent preference for these types of measures is at odds with his simultaneous claim that the mirror denies his right of confrontation.

tled off to another room, but was available to freely consult with his attorney in the courtroom during testimony. The defendant would not be viewed as a danger and the jury could see the witnesses testify.

To minimize the prejudice to the defendant, the mirror was in place only for the victims' testimony and removed immediately thereafter. At the same time the court gave a cautionary instruction to the jury to negate possible inferences adverse to the defendant. The trial judge was familiar with the courtroom, supervised the placement of the mirror, and fully considered the options available.

Many state courts and legislatures are struggling with a variety of measures to protect both the victim and the defendant from harm.[20] The movement of these states with a unified purpose is not without constitutional significance in describing the "flex" in due process standards. A trial court presiding over a child victim trial faces difficult balancing decisions. The Court must accommodate both the child's interest in avoiding undue trauma and the defendant's right to due process.

D. Summary.

The use of a one-way mirror did not place on Coy "an unmistakable brand of guilt." *Williams*, 425 U.S. at 518 (Brennan, J., dissenting). It was the unmistakable physical evidence that assured the guilty verdict. Although the victims could not see Coy's face behind the nylon mask and the glare of the flashlight, his identity was unveiled by the strong physical and circumstantial evidence against him. Iowa Code section 910A.3 invested trial court with discretion which was exercised in a constitutionally permissible way. The protection of child victims is an essential state interest. While this Court might express a preference for alternative methods of addressing competing interests, this Court should intervene in a state court proceeding only when "the scene presented to jurors . . . was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial." *Holbrook*, 475 U.S. 560, 106 S. Ct. at 1348. The mirror was not inherently prejudicial, and Coy has failed to show to the contrary. Whatever risk is present is constitutionally tolerable.

[20]See Brief of Amicus, Kentucky, at 29. "In comparison the challenged Iowa procedure is quite modest . . . If this court were, at this early juncture, to strike down this minimal, narrowly tailored protection of the child, it would substantially cripple the emerging nationwide effort to evolve an accommodation."

II. THE PETITIONER'S SIXTH AMENDMENT RIGHT TO CONFRONTATION DOES NOT INCLUDE THE RIGHT TO FORCE HIS GLARE UPON THE VICTIMS OF SEXUAL ABUSE IN A CRIMINAL TRIAL.

The victims testified under oath in the courtroom. They sat next to the jury box, where the jury could simultaneously see them and the defendant as they testified. J.A. 6. Coy also sat in the courtroom and, through the one-way mirror, could see the victims as they testified.[21]

[21]Coy argues that he could not see the victims well while they testified. The trial court, in describing the courtroom scene, said, "I'm seated where the defendant is. It is possible to dimly see a person seated in the witness chair . . . . You can see the features of the person seated in the witness chair, but it is dark." J.A. 10.

The trial judge could see the testifying witnesses seated next to him. J.A. 6. Counsel could see the witnesses as they testified. Coy's inability to force his stare on the victims as they testified was the only missing component of the usual courtroom encounter.[22]

A. The Sixth Amendment Confrontation Clause Guarantees A Right To Meaningful Cross-Examination, Not The Right To Further Traumatize The Victim Of Sexual Abuse.

The sixth amendment right of confrontation combines a defendant's right to be present with the right to cross-examine adverse witnesses. The right protects the opportunity for the jury to best determine credibility and truth. Historically, as an outgrowth of the distrust of hearsay evidence, the right to confront witnesses ensured that defendants would not regularly be tried *in absentia* or by *ex parte* affidavit. From the principal purpose of cross-examination the concept of confrontation through physical presence also developed. A defendant would have an adequate opportunity to test the truth of the testimony presented through cross-examination and a jury would have a basis for determining the believability of a witness through observation. *Dowdell v. United States*, 221 U.S. 325, 330 (1910); *Mattox v. United States*, 156 U.S. 237,

[22]Coy acknowledged at trial that the victims "were being told they can be seen" through the mirror. J.A. 11. The trial court also noted in the presence of the witnesses that "I anticipate that there might be situations in which the screen might have to be removed."

242-43 (1895). *See generally California v. Green*, 399 U.S. 149, 175-83 & nn.6-17 (Harlan, J., concurring).[23]

The sixth amendment right of confrontation is a functional right designed to "advance 'the accuracy of the truth-determining process in criminal trials.'" *Tennessee v. Street*, 471 U.S. 409, 415 (1985), *quoting Dutton v. Evans*, 400 U.S. 74, 89 (1970), and "to prevent improper restrictions on the type of questions that defense counsel may ask during cross-examination." *Pennsylvania v. Ritchie*, 107 S. Ct. 989, 999 & n.10 (1987).

Confrontation cases generally fall into two broad categories: "cases involving the admission of out-of-court statements and cases involving restrictions imposed by law or by the trial court on the scope of cross-examination." *Delaware v. Fensterer*, 474 U.S. 15, 18 (1985) (per curiam), quoted in *Kentucky v. Stincer*, 107 S. Ct. 2658, 2663 (1987). Cases involving out-of-court statements generally require a showing of the unavailability of the witness and indicia of reliability of the statement. *Stincer*, 107 S. Ct. at 2663. Cases involving restrictions on cross-examination focus on whether the restrictions affect the jury's determination of the credibility of the witness or the truth of the testimony. *Id.*

This case obviously does not fall within the out-of-court statements category, because the witness was seated

[23]Justice Harlan provided a modern translation of the confrontation clause: "In all criminal prosecutions, the accused shall enjoy the right to be present and to cross-examine the witnesses against him." *Dutton v. Evans*, 400 U.S. 74, 95 (1970) (Harlan, J., concurring).

in the witness chair in front of the jury, available for cross-examination. Nor does this case fit within the restricted examination category, because the functional right of cross-examination was satisfied.

As Coy properly recognizes, the primary focus of confrontation analysis is on the opportunity to cross-examine. *Kentucky v. Stincer*, 107 S. Ct. 2658, 2664 (1986); *Douglas v. Alabama*, 380 U.S. 415, 418 (1965). "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974). The "examination and cross-examination" envisioned in 1895 was that in which

> the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand *face to face with the jury* in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Mattox, 156 U.S. 237, 242-43 (1895) (emphasis added).

The "face-to-face" phraseology used in 1895 indicated confrontation was meant to provide a defendant the opportunity to defend against in-person accusations rather than written accusations, not to permit a defendant to force eye-contact with a witness.[24] Coy concedes as much when he

[24]"It would be unconstitutional for the government to take evidence in secret and outside of the presence of the defendant, but there is no right to eyeball to eyeball presence.

The right to confront does not confer an automatic right to intimidate. The sound discretion of the trial judge is the best gauge to determine the fairness of a proceeding."

Commonwealth of Kentucky v. Willis, 716 S.W.2d 224, 230-231 (Ky. 1986).

recognizes that the victim simply could be instructed to look away from the defendant. Appellant's Brief at 31, n. 38. He does not contend that his right of confrontation could be used as a sword to force the victims to look at him throughout their testimony, nor is such a proposition logical or practical. Even when the victim can identify the defendant as the perpetrator, the defendant has no constitutional right to force a witness to observe his or her glare unless the failure somehow denies the defendant due process. A defendant has no constitutional right to intimidate a witness, whether that intimidation is intentional or unintentional, subtle or blatant. The confrontation clause only guarantees "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. at 20 (1985) (emphasis in original).

To the extent that the witness's testimony will be affected by the defendant's glare,[25] the defendant's constitutional rights are not implicated. The sixth amendment does not regulate the witness's presentation in the courtroom. Thus, if the witness appears in court in person but chooses to look away from the defendant, to change appearance, to take voice or diction lessons, or to otherwise affect the jury's assessment of credibility, the defendant has the opportunity to explore these factors in cross-examination and to later argue the appropriate inferences to the jury. The defendant, however, has no constitutional

[25]*See United States v. Benfield*, 593 F.2d 815, 821 (8th Cir. 1979) ("Most believe that in some undefined but real way recollection, veracity, and communication are influenced by face-to-face challenge").

right to force the witness to conform to the defendant's demands as to how the testimony should be presented.

Any interest the defendant has in what may be called the intimidation factor is at best a tertiary interest not protected by the constitution. This is reflected in recent pronouncements on the purposes of confrontation:

> Confrontation: (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of the truth;" (3) permits the jury to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

Lee v. Illinois, 476 U.S. 530, 106 S. Ct. 2056, 2062 (1986), quoting *California v. Green*, 399 U.S. 149, 158 (1970). In *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L.Ed.2d 347 (1974), this Court explained the purpose for confrontation as follows:

> "The main and essential purpose of confrontation is to *secure for the opponent the opportunity of cross-examination*. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers." (Emphasis in the original) 5 J. Wigmore, *Evidence* § 1395, p. 123 (3rd Ed. 1940).

Id. at 315-316. *See also, California v. Green*, 399 U.S. at 166 ("[T]he right of cross-examination . . . provides substantial compliance with the purposes behind the confrontation requirement.") A secondary purpose of the confrontation clause is that:

> the judge and the jury are enabled to obtain the elusive and incommunicable evidence of a witness' deportment while testifying, and a certain subjective moral effect is produced upon the witness. . . . This secondary advantage, however, does not arise from the confrontation of the opponent and the witness; it is not the consequence of those two being brought face to face. It is the witness' presence before the tribunal that secures the secondary advantage. . . .

5 J. Wigmore, *Evidence* § 1395 at 153-54 (Chadbourn rev. 1974). This Court's recent cases have all but ignored the ephemeral benefit of having eye-to-eye contact between the defendant and the witness.

All three of the above constitutionally recognized purposes were met. The victims testified under oath, in the courtroom, within the view of the judge and jury who were able to observe their demeanor and determine their credibility. Coy's counsel cross-examined both girls fully and without limitation. They knew that the defendant was behind the mirror,[26] which might be removed at any time during their testimony. Coy never asked that the mirror be removed, nor did he profess at trial that he could not

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[26]This is only one of the facts distinguishing this case from *U.S. v. Benfield*, 593 F.2d 815 (8th Cir. 1979), upon which Coy relies. In *Benfield*, a deposition was involved, the jury was not present to observe the actual testimony, the victim was an adult, not a child, the charge did not involve sexual abuse, and the deponent was unaware of the defendant's presence or observation. Interestingly, *Benfield* acknowledged that "where the procedure more nearly approximates the traditional courtroom setting, our approval might be forthcoming." *Id.* at 821.

see the victims while they testified.[27] The underlying purpose of confrontation—to assist in determining the truth—has been satisfied. Any additional benefit to the defendant in having the witnesses meet the defendant's glare does not rise to the level of a constitutional protection.

B. Even If Sixth Amendment Values Are Implicated In This Case, The Right Of The Defendant Is Outweighed By The Necessity Of Protecting Victims Of Sexual Abuse From Further Injury.

Coy nonetheless argues that any variation in the traditional courtroom procedure which necessarily affects the witness-defendant or the witness-jury view mandates some showing of necessity. In making his claim, Coy relies on cases in which the victim was not present in the courtroom to testify before the jury and the defendant.[28] He acknowledges that there are no cases factually similar.[29]

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[27]Coy intimates now that he was unable to see the victims during their testimony. Appellant's Brief at 36 n.44. The record which he cites shows that he was indeed able to see the victims through the mirror.

[28]*See, e.g., Hockheiser v. Superior Court,* 161 Cal. App. 3d 777, 208 Cal. Rpter. 273 (1984); *Long v. State,* 694 S.W.2d 185, 191 (Tex. App. 1985); *State v. Melendez,* 661 P.2d 654 (Ariz. 1982); *State v. Warford,* 389 N.W.2d 575 (Neb. 1986); *Commonwealth v. Willis,* 716 S.W.2d 224, 229-30 (Ky. 1986); *State v. Daniels,* 448 So.2d 941, 943 n.2 (La. App. 1986).

[29]Even the prior Iowa case, *State v. Strable,* 313 N.W.2d 497 (Iowa 1981), is not analogous. In *Strable,* the defendant was placed behind an opaque blackboard so that he could not see the victim's demeanor while she testified. The Iowa Supreme Court did not find it necessary to reach the confrontation claim there. *Id.* at 501.

The Iowa Supreme Court held that compliance with 910A.3 in the context of this case even absent such a showing of necessity was constitutional: "In the confrontation clause context, the issue of necessity arises when a witness is unavailable for trial and a party seeks to introduce some prior statement or testimony of that witness." J.A. 77, citing *Ohio v. Roberts,* 448 U.S. 56, 65 (1980).

Even if the mirror did touch upon some confrontational interest of the defendant, it did not affect the ultimate integrity of the trial. Any interest is so slight that, on balance, a minimal showing of necessity would be required.

This Court has recognized that competing interests if "closely examined," *Chambers v. Mississippi,* 410 U.S. at 284, 295 (1973), may warrant dispensing with confrontation at trial. "General rules of law . . . must occasionally give way to considerations of public policy . . ." *Ohio v. Roberts,* 448 U.S. at 64, citing *Mattox v. United States,* 156 U.S. at 243. In this instance the asserted "right" of eye contact must be weighed against the rights of the victim, described as a compelling state interest. *Globe Newspaper,* 457 U.S. at 607.

The statute under challenge grants discretion to the state court trial judge, who is most knowledgeable about the victims and defendant appearing before him. The absence of a specific finding of those factors found by courts to be instructive on the exercise of his discretion is not constitutionally fatal.

Children must not be subjected to a second victimization. As the American Bar Association in its Amicus brief points out, "relevant information . . . may be pre-

sented to the court from various sources and in numerous ways . . . [M]ost of the criteria a judge would consider in exercising that discretion (e.g. nature of the crime, relationship of victim to defendant, existence of prior threats, child's refusal to testify) are based upon knowledge within a layperson's competency." (Brief, Amicus ABA, pp. 17-18). As discussed in this Brief, *supra,* pp. 16-18, trial court had, from his own observation, personal knowledge of these factors in this case, readily discernible from the record.

Defense counsel acknowledged at trial that he had been told that the victims would be less uneasy if they testified with the mirror. The record shows that the victims had been threatened by Coy. The victims had good reason to suspect their next door neighbor Coy as their attacker. The threat was still in effect.

Coy has not demonstrated nor alleged any avenues of cross-examination that were not traveled. There has been no showing of actual prejudice. Any required showing of minimal necessity was met.

The words of Justice Cardozo in *Snyder v. Massachusetts,* 291 U.S. 97, 122 (1934) are appropriate.

> "There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the 14th Amendment if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law and set the guilty free."

III. WHILE EXPRESS FINDINGS MAY HAVE BEEN PREFERABLE, ANY FAILURE TO MAKE EXPRESS FINDINGS UNDER THE CIRCUMSTANCES OF THIS CASE IS HARMLESS ERROR.

In *Chapman v. California,* 386 U.S. 18 (1967), this Court concluded and recently reiterated in *Delaware v. Van Arsdall,* 106 S. Ct. 1431, 1438 (1986) that harmless error analysis is applicable to demands for reversals under the confrontation clause. Certain errors even of constitutional significance are harmless in their effect on the factfinding process, which is "the central purpose of the trial."

The defendant is entitled to a fair trial, not a perfect one. *Delaware,* 106 S. Ct. at 1436. After receiving the former, Coy now seeks the latter.

Coy argues tautologically that because the use of the mirror was inherently prejudicial, it cannot be harmless as a matter of law. Similarly, he argues that denial of eyeball to eyeball confrontation was a 'core' violation which cannot be harmless; that the definition of "inherently prejudicial' almost commands that result. He argues that it cannot be "rationally" said, by definition, that the use of the mirror, if inherently prejudicial, did not influence the verdict, *Chapman,* 386 U.S. at 23, nor can it be asserted that if eye contact is an essential component of the right of confrontation, that by definition Coy was not denied that 'right.'

The fault in Coy's analysis lies in its focus. The analysis does not stop with the tautology. As Coy concedes, if an essential state interest is shown, then the mirror may be used even if inherently prejudicial. Coy does not assert that upon the granting of his requested new trial,

the mirror could not be used. His objection is really to the process by which the decision was made. It is that process to which harmless error analysis should and can be applied.

The proper inquiry is on Coy's assertion that "the state failed to demonstrate that use of a screening barrier was necessary to an essential state interest and the trial court failed to consider the use of less prejudicial alternatives." Appellant's Brief p. 44. The critical question is whether the reviewing court can say that the failure of trial court to specifically articulate those reasons is harmless error.

The focus is not then on the witnesses or their testimony which, as Coy points out, is crucial, nor on the substantial and overwhelming evidence against Coy, nor on an attempt to predict the outcome of the trial without the alleged infirmities, which most certainly would be the same. The proper focus is whether the necessary 'essential state interest' is present.

That interest and the court's consideration of alternatives is readily discernible from this record and has been discussed. Both the legislature of Iowa and the trial court concurred with other courts and commentators that protection of child victims was compelling. The method selected was minimally intrusive, probably the most minimally intrusive, and left intact confidence in the outcome.

It can fairly be said that the omission of the trial court to reiterate the statements of purpose of the legislature or to formally enumerate his thoughtful considerations as to method, did not "contribute to the verdict obtained." *Chapman,* 386 U.S. at 24. Coy was found guilty upon the evidence, not because the trial judge omitted a pre-trial order. The error, if any, was harmless.

CONCLUSION

For all of the reasons stated above, the State respectfully requests that this Court affirm the conviction of Defendant-Appellant.

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REPLY

BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOHN AVERY COY,

Appellant,

v.

STATE OF IOWA,

Appellee.

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ARGUMENT

I. USE OF A BARRIER IN THE JURY'S PRESENCE TO SCREEN APPELLANT WAS INHERENTLY PREJUDICIAL.

Whenever a courtroom arrangement is challenged as inherently prejudicial, the focal inquiry is whether there is an unacceptable risk that impermissible factors may consciously or subconsciously influence the jury's deliberations. *Holbrook* v. *Flynn*, 106 S.Ct. 1340, 1347 (1986); *see Estelle* v. *Williams*, 425 U.S. 501, 505 (1976).

Appellee contends that the prejudicial impact of a screening barrier placed directly in front of appellant at counsel table, during a criminal jury trial, cannot be determined because the "actual courtroom appearance" is not adequately reflected in the trial record and that, in any event, the screening barrier was "quite modest" (Appellee's Brief at 10-11, 22). The trial record and the photograph of the screening device taken at the court's direction (J.S. App. 15a) contradict both assertions.

Following opening statements, the judge instructed the bailiff to turn off the courtroom lights and close the window blinds. With the courtroom in near total darkness (J.S. App. 15a), a screening barrier was positioned directly in front of appellant at counsel table.[1] The barrier was then illuminated by a panel of four spotlights (J.A. 14; J.S. App. 15a). Into that "eerie" atmosphere (J.A. 14), two thirteen year old girls were ushered, one at a time, through a special entrance (J.A. 6), to provide critical testimony as the state's first and primary witnesses against appellant. This unprecedented courtroom arrangement was overwhelming and had a devastating impact on appellant's right to a fair trial. Use of the screening barrier was a gross deviation from standard trial procedure, and clearly communicated to the jury that appellant was different and

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[1] The barrier was constructed in the garage of the courthouse custodian and measured over six feet high and four feet wide (Appendix A, Photograph 1).

dangerous, that he was feared by and harmful to the state's witnesses, and that he was guilty of the crime charged.

Appellee further argues that if the screening barrier caused jurors to speculate at all, the only inferences that could be drawn from its use were non-incriminating (Appellee's Brief at 11). An obvious inference, appellee maintains, is that the court was "concern[ed] for child witnesses" rather than that the defendant was guilty (Appellee's Brief at 9).[2] That suggested inference, however, ignores the function served by the barrier in the courtroom.

The screening barrier isolated only appellant from view by testifying witnesses. It did not relieve the witnesses from having to share, in a strange setting, intimate details of their sexual assault. Nor did it prevent repetition of those details on direct, cross, re-direct and re-cross-examinations (Trial Tr. pp. 37-111). The barrier did not shield the witness from the gaze of the judge, dressed in a black robe, or from the twelve jurors seated next to the witnesses as they testified. And the witnesses were still required to give their testimony in the presence of the prosecutor and defense counsel, bailiff, court reporter, courthouse personnel, media representatives and interested spectators.[3]

Singling out appellant by use of the screen signalled to the jury that he, and he alone, was different and that he posed an

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[2] Appellee's contention that the "most likely inference" to be drawn from the screening barrier is "of the implementation of a law requiring the screen" (Appellee's Brief at 9) is illogical. The court did not instruct the jury that Iowa law mandated the use of a screening device in all cases involving child witnesses (*see* Appellant's Brief at 6-7 n. 12). Iowa law, in fact, does not *require* the use of a screening device or any protective measure during testimony of child witnesses. Iowa Code §910A.14 vests *discretion* in the trial court to use a screen or mirror in appropriate cases. Furthermore, as appellant previously indicated (Appellant's Brief at 4 n.7), Iowa law appears to contemplate the use of a screen or mirror only *outside the courtroom*.

[3] Amicus cites each of these factors in support of the proposition that "[t]he risk of trauma in all cases is substantial." (Brief of Amicus, Kentucky, at 23 n. 16).

immediate danger to the child witnesses. Only the most dangerous criminals require physical separation from society by means of a structural barrier. While placing a criminal defendant in shackles or prison garb during trial necessarily suggests to the jury that he is generally dangerous, *see Estelle* v. *Williams*, 425 U.S. at 505, use of a screening barrier in this case communicated to the jury that appellant was a *specific danger* to the child witnesses and to children in the community. Planting that seed in the minds of the jurors at the outset of trial assuredly affected the impartiality of that jury's judgment and, thus, eroded the presumption of innocence.

Appellee concludes with the preposterous assertion that any prejudice was caused, not by use of the screen, but by appellant's objections to it (Appellee's Brief at 9 n. 1). It was hardly defense counsel's objections to the barrier that drew the jury's attention to it.[4] The jury was simply incapable of ignoring the large and imposing structure illuminated by bright lights and placed directly in front of appellant in the center of the darkened courtroom. Furthermore, a failure by appellant to assert timely objections to the screening device would have been "sufficient to negate the presence of compulsion necessary to establish a constitutional violation." *Estelle* v. *Williams*, 425 U.S. at 513. It would be the ultimate injustice to conclude that, by properly preserving the issue of constitutional error, appellant contributed to it and thereby forfeited his right to redress.

II. USE OF A BARRIER TO SCREEN APPELLANT INFRINGED ON HIS RIGHT TO CONFRONT ADVERSE WITNESSES.

Despite this Court's repeated emphasis that the confrontation clause "reflects a preference for face-to-face confrontation

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[4] In fact, the court first mentioned the screening barrier and emphasized its novelty in a jury instruction (*see* Appellant's Brief at 46). Prior to any objection by defense counsel, the court noted that "It's quite obvious that there's a screen device in the courtroom." (J.A. 17).

at trial," *Ohio* v. *Roberts*, 448 U.S. 56, 65 (1980); *see Davis* v. *Alaska*, 415 U.S. 308, 315 (1974); *California* v. *Green*, 399 U.S. 149, 157 (1970); *Dowdell* v. *United States*, 221 U.S. 326, 330 (1911);[5] appellee maintains that placement of a screening barrier directly in front of appellant during the testimony of the state's two key witnesses does not implicate the sixth amendment (Appellee's Brief at 24-30).[6] The flaw in appellee's conclusion stems from misappiication of the underlying purposes of the confrontation clause to the facts of this case.

The essential purpose of confrontation is to advance and protect the process of accurately determining the truth in criminal trials. *Lee* v. *Illinois*, 106 S.Ct. 2056, 2062 (1986); *Tennessee* v. *Street*, 471 U.S. 409, 414 (1985); *Dutton* v. *Evans*, 400 U.S. 74, 89 (1970). This Court has recognized that the right to confront adverse witnesses also serves a symbolic goal:

> . . . confront[ation] . . . contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails. To foster such a system, the Constitution provides certain safeguards to promote to the greatest possible degree society's interest in having the accused and accuser engage in an open and even contest in a public trial.

Lee v. *Illinois*, 106 S.Ct. at 2062. These functional and symbolic goals are advanced by: 1) requiring adverse witnesses to give their testimony under oath; 2) compelling those witnesses to submit to cross-examination; and 3) requiring adverse witnesses to face the judge, jury and accused during their testimony so that the jury may assess their demeanor, and judge by the manner in which they testify whether they are worthy of belief.[7] *See Mattox* v. *United States*, 156 U.S. 237, 242-43 (1895); *California* v. *Green*, 399 U.S. at 158.

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[5] In *Pennsylvania* v. *Ritchie*, 107 S.Ct. 989 (1987), Justice Powell identified two types of protections provided to the criminal defendant through the confrontation clause: "the right physically to face those who testify against him, and the right to conduct cross-examination." *Id.* at 998.

[6] Appellee's position is refuted by Amici who, after surveying the origins of the confrontation clause, acknowledge that "face-to-face challenge is an ordinary component of the confrontation guarantee . . ." (Brief of Amici, Connecticut et al., at 8).

While "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested," *Kentucky* v. *Stincer*, 107 S.Ct. 2658, 2662 (1987), *quoting Davis* v. *Alaska*, 415 U.S. at 316, a face-to-face, in-court challenge also significantly contributes to the search for truth. "Most believe that in some undefined but real way recollection, veracity, and communication are influenced by face-to-face challenge." *United States* v. *Benfield*, 593 F.2d 815, 821 (8th Cir. 1979); *see also Wildermuth* v. *State*, 530 A.2d 275, 282 (Md. 1987); *Herbert* v. *Superior Court*, 117 Cal. App.3d 661, 670, 172 Cal. Rptr. 850, 855 (1981). The right of the accused to be seen by his accuser supports the truth-seeking function of the confrontation clause because:

> . . . it tends to impress upon the witness the seriousness and solemnity of the occasion, and as a consequence, the necessity for truthful testimony. The need for truthfulness is further enhanced by the witness's awareness that the accused has personal knowledge of the facts bearing on his or her involvement in the offense charged.

Wildermuth v. *State*, 530 A.2d at 283; *see also State* v. *Jarzbek*, 529 A.2d 1245 (Conn. 1987).

"That an actual physical two-way confrontation, between accuser and accused, is normally an element of the right of

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[7] Appellee's argument that a criminal defendant has no constitutional right to force adverse witnesses to look at him throughout their testimony (Appellee's Brief at 27) misses the point. Appellant does not contend that the state's witnesses should have been compelled to look at him while they testified. Rather, he believes that requiring witnesses to testify while they were capable of viewing him would provide significant information to the jury about the witnesses' credibility and the truth of their testimony.

confrontation is consistent" with the essential purpose of the confrontation clause to advance the search for truth.[8] *Wildermuth* v. *State*, 530 A.2d at 283. Infringement on appellant's confrontation rights in this case undermined the very integrity of the truth-finding process. *See Ohio* v. *Roberts*, 448 U.S. at 64; *Chambers* v. *Mississippi*, 410 U.S. 284, 295 (1973); *Berger* v. *California*, 393 U.S. 314, 315 (1969).

III. INFRINGEMENT ON APPELLANT'S RIGHT TO A FAIR TRIAL AND TO CONFRONT ADVERSE WITNESSES WAS NOT JUSTIFIED IN THIS CASE.

To justify infringement on appellant's fundamental rights, appellee must demonstrate that the infringement was carefully tailored to meet, and was the least intrusive means of achieving, a compelling state interest. *See Holbrook* v. *Flynn*, 106 S.Ct. at 1347. This, appellee has not done. Appellee cannot point to any place in the record where the prosecution articulated or the trial court found that use of a screening barrier served an essential state interest. To the contrary, the trial record is intolerably silent on this critical point. Nor can appellee identify any record entry where the trial court gave

[8] Appellant recognizes that a criminal defendant has no constitutional right to intimidate or harass a complaining witness (*see* Appellee's Brief at 27). However, nothing in this record suggests that appellant "glared" at or attempted to intimidate complaining witnesses at trial in any way. The suggestion of intimidation, advanced by appellee, is belied by appellee's admission that "Coy . . . sat passively in the courtroom throughout the trial" (Appellee's Brief at 11). Furthermore, arguing that intimidating conduct by the unidentified assailant may serve as a waiver of appellant's confrontation rights (Appellee's Brief at 18; Brief of Amici, Connecticut et al., at 22-23) presumes appellant's guilt and subverts the most basic component of due process. *See State* v. *Jarzbek*, 529 A.2d at 1253 ("The constitutional right of confrontation would have little force, however, if we were to find an implied waiver of that right in every instance where the accused, in order to silence his victim, uttered threats during the commission of the crime for which he is on trial.").

careful consideration to less prejudicial means of achieving any presumed state interest.

Appellee, nonetheless, argues that an essential state interest may be gleaned from the legislative intent of the Iowa statute challenged by this appeal (Appellee's Brief at 13-16). That conclusion is belied, however, by the very terms of the legislative enactment in question. Iowa law does not presume, as appellee maintains, that trauma to the child witness is the norm (Appellee's Brief at 16). If it did, protective procedures would be mandated in every case where children testify. Iowa law, instead, recognizes that a child *may* be traumatized by testifying in court and thus vests the trial court with discretion to employ protective measures *when necessary* in particular cases. *See* Iowa Code § 910A.14. A demonstration, in this case, of the need for a screening barrier is completely absent from the record.

Nor may an essential state interest be extrapolated from empirical data analyzing the effects on child witnesses of testifying in the presence of the accused (*see* Appellee's Brief at 13-15; Amicus Brief, Kentucky, at 20-23).

> Thus far, no compelling case has been made that sexually abused children as a class are sufficiently different from other witnesses to justify abrogation of [the] long-standing attributes of the adversary system.

Melton, *Children's Testimony in Cases of Alleged Sexual Abuse*, ADVANCES IN DEVELOPMENTAL AND BEHAVIORAL PEDIATRICS (Wolraich & Routh, eds. 1987) p. 195; *see generally* Melton & Thompson, *Getting Out of A Rut: Detours to Less Travelled Paths in Child-Witness Research*, CHILDREN'S EYEWITNESS MEMORY (Ceci, Toglia, & Ross, eds. 1987) p. 224 ("It is not self-evident that child victims of sexual abuse . . . are at a substantially greater risk from testimony under conventional procedures than other child victims, child witnesses of violent offenses, adult victims of sexual offenses, or even witnesses in general."). After an exhaustive review of the social science research about the

effects on child sex abuse victims of testifying in front of their alleged offenders, the American Psychological Association concluded that "case-by-case determinations of the effects on individual children [must] be made before defendants' rights are infringed or courtroom procedures are otherwise modified." *Kentucky* v. *Stincer*, 107 S.Ct. 2658 (1987) (Amicus Brief, American Psychological Association, at 25).

While "safeguarding the physical and psychological well-being of a minor" is a compelling state interest, *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 607 (1982), the state must establish, *on a case-by-case basis*, that the welfare of a minor victim is in jeopardy before infringing on fundamental rights. *Id.* Appellee maintains that the *Globe* requirements are inapplicable here because of the "unique status of first amendment protections and . . . because [*Globe*] dealt with closure of a trial" (Appellee's Brief at 16). To the contrary, because this case involves infringement on a criminal defendant's right to a fair trial ("the most fundamental of all freedoms," *Estes* v. *Texas*, 381 U.S. 532, 540 (1965)), the *Globe* requirements should be applied with greater stringency.[9]

While admitting that the trial judge did not specifically articulate an essential state interest justifying the use of a screening barrier (Appellee's Brief at 17), appellee maintains that this Court can intuit "what factors were considered and the impact of each in the final decision" *(Id.)*. But infringement on appellant's fundamental trial rights should not be justified on the basis of intuition and speculation. The trial court's discretion is not absolute and the rationale for extraordinary courtroom modifications should be articulated on the record so that an appellate court may review the exercise of that discre-

[9] As pointed out in Appellant's Brief at 24, when conflicts have developed between the public's right of access and a criminal defendant's right to a fair trial, this Court has zealously protected the latter. *See Estes* v. *Texas*, 381 U.S. 532 (1965).

tion.[10] *Cf. Brewster* v. *Bordenkircher*, 745 F.2d 913, 916 (4th Cir. 1984) (rationale for special security measures must be articulated on record).

Appellee asserts that trial courts need "breathing room" in fashioning procedures designed to protect child witnesses (Appellee's Brief at 16). Amicus maintains that striking down use of the screening barrier in this case "would substantially cripple the emerging nationwide effort" to protect the "psychological health of the child victim" (Amicus Brief, Kentucky, at 27). In fact, reversal in this case would have virtually no impact on emerging practices and procedures to protect the child witness from the potential trauma of testifying in court. Appellant only requests that before such procedures are utilized, they are shown to be necessary.

IV. VIOLATION OF APPELLANT'S FUNDAMENTAL RIGHTS WAS NOT HARMLESS.

Considering the nature and the extent of the infringement on appellant's constitutional rights, a harmless error analysis is inappropriate in the facts of this case. Use of the screening barrier was inherently prejudicial and thus affected the attitudes of the jurors towards appellant, consciously and subconsciously, throughout the trial. The insidious effect of the extraordinary courtroom arrangement simply cannot be cast aside as harmless. *See Fahy* v. *Connecticut*, 375 U.S. 85, 91-92 (1963) ("evidence was prejudicial to petitioner and hence it cannot be called harmless error"); *Brewster* v. *Bordenkircher*, 745 F.2d at 917-18 ("[o]nly an error that does not prejudice can be deemed harmless").

Appellee contends not only that a harmless error analysis is appropriate in this case, but that the focus of that analysis

[10] In Myers, CHILD WITNESS LAW AND PRACTICE (1987) pp. 391-92, the author identifies thirty factors that courts consider in evaluating the potential harm of in-court testimony to the child witness.

should be on the trial court's failure to articulate an essential state interest and to carefully consider less prejudicial alternatives, rather than on the impact of the screening barrier (Appellee's Brief at 33-34). The fault in that analysis is appellee's presumption that an essential state interest was served by the barrier, and that the only error was in the court's failure to clearly identify it.[11] As previously discussed (Appellant's Brief at 28-29), a compelling interest cannot be gleaned from the trial record nor should such an interest be presumed from the nature of the charge. Imposition of the screening barrier was, therefore, an error of constitutional magnitude that cannot be deemed harmless.

CONCLUSION

For the reasons stated in our original Brief, and in this Reply Brief, appellant requests that the judgment of the Supreme Court of Iowa be reversed.

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[11] Appellant does not concede, as appellee asserts (Appellee's Brief at 33), that if the barrier is inherently prejudicial its use could, nonetheless, be justified by demonstration of a compelling state interest. Given the range of less prejudicial alternatives available to the trial court, use of an in-court screening barrier is never justified. *Cf. Estelle* v. *Williams*, 425 U.S. 501 (1976).

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
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No. 86-6757

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOHN AVERY COY,

Appellant,

V

STATE OF IOWA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF IOWA

BRIEF OF AMICUS CURIAE

JUDGE CHARLES B. SCHUDSON

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No. 86-6757

JOHN AVERY COY,
Appellant,

V

STATE OF IOWA,
Appellee.

On Appeal from the Supreme Court of Iowa

BRIEF OF AMICUS CURIAE JUDGE CHARLES B. SCHUDSON

INTEREST OF THE AMICUS CURIAE

Judge Charles B. Schudson is a member of the faculties of the National Judicial College and the National Council of Juvenile and Family Court Judges. On behalf of the College and Council he has traveled throughout the country, teaching judges and other professionals about the evolving laws and trial techniques in child

abuse and sexual assault cases.[1] Since 1982, Judge Schudson has been a Wisconsin Circuit Court Judge serving in the juvenile and criminal divisions in Milwaukee County. From 1975 to 1982 he was a state and federal prosecutor, specializing in cases involving battered women, nursing home patients, and other victims with limited ability to appear or communicate in a courtroom.[2] Judge Schudson is the co-author of On Trial: Sexually Abused Children in America's Courts (Beacon Press: 1988).

Judge Schudson, with the written consent of the parties,[3] submits this brief as amicus curiae to assist this Court, based on understanding gained in the course of his research, teaching, and writing.

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[1] A list of those speaking engagements is in the Appendix.

[2] Judge Schudson's published works include: "The Criminal Justice System as Family: Trying the Impossible for Battered Women" (United States Commission on Civil Rights: 1978); "Nailing an Omelet to the Wall: Prosecuting Nursing Home Homicide," in Corporations as Criminals (Sage: 1984)

[3] Copies of the letters of consent have been filed with the Clerk of the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Legislatures and courts are enacting statutes, interpreting laws, and developing techniques to enable children to be heard in criminal courts, while preserving the Sixth Amendment rights of defendants. The use of a one-way screen, mirror, or closed-circuit television is an appropriate and excellent method to assure the rights of both child witnesses and defendants. Such methods enable the jury to search for the truth. Failure to use such methods often precludes the possibility of a trial.

ARGUMENT

This Court understands that child abuse and sexual assault are among "the most difficult crimes to detect and prosecute" because of the child's "feelings of vulnerability and guilt, and his or her unwillingness to come forward...." Pennsylvania v. Ritchie, 480 U.S. ____, 107 S.Ct. 989, 94 L.Ed.2d 40,59 (1987). While in other cases the inability of a witness

to testify may only reduce the evidence available to a jury, in a child abuse or sexual assault case the inability of a child to testify often precludes the possibility of a trial "in large part because there often are no witnesses except the victim." Ritchie, at 59. This often is true even when corroborating evidence of the abuse is overwhelming.[4]

Accordingly, as the extent and severity of child abuse and sexual assault have become more apparent, legislatures and courts have re-examined legal traditions in an effort to provide children with the chance to be heard while, at the same time, protecting a defendant's Sixth Amendment rights. The result has been a relatively rapid evolution of legislation, courtroom techniques, and appellate law. From these, certain legal developments are most pronounced. An understanding of these developments provides important perspective on the Iowa one-way screen procedure.

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[4] See, for example, case studies in "Making Courts Safe for Children," in the Appendix.

In recent years, legislatures and courts have tried to offer children the chance to be heard in four ways: 1) by eliminating or modifying child competency restrictions; 2) by enacting or interpreting hearsay exceptions to allow a jury to learn of a child's disclosure or complaints; 3) by broadening the potential for expert testimony to allow juries to hear from a variety of professionals who can explain a child's non-verbal communication; and 4) by developing courtroom techniques to help a child feel comfortable enough to testify. In all four, legislators and judges have tried to recognize the unique factors that prevent children from being heard in abuse and sexual assault cases, to understand that such factors undermine the potential for justice through the courts, and to correct that injustice without reducing a defendant's rights.

1) Competency: Many states have followed the federal example by eliminating the competency restriction on child witnesses, thus removing what some considered "the No. 1 legal

rule preventing successful prosecution of child-molestation cases." D. Whitcomb, E. Shapiro, & L. Stellwagen, When the Victim is a Child: Issues for Judges and Prosecutors (U.S. Department of Justice: 1985), quoting Professor Irving Prager, University of La Verne College of Law. In states where a competency rule remains, judges have sought to apply it with common sense language and procedures appropriate to the child's age and circumstances. This Court approved such flexibility even if it entails removal of the defendant from the competency hearing. The standard is whether the defendant's "presence would contribute to the fairness of the procedure." Kentucky v. Stincer, 482 U.S. ____, 107 S.Ct. 2659, 96 L.Ed.2d 631,647 (1987).

2) Hearsay Exceptions: Traditionally, a child's complaint of abuse or sexual assault has been admitted under a variety of hearsay exceptions including "complaint of sexual conduct," "tender years," and "diagnosis/treatment." Recently, courts have undertaken careful analyses of these and other exceptions. Most significantly, courts have enlarged the "diagnosis/

treatment" exception to allow for testimony from mental health professionals in addition to doctors, and to allow the witnesses to relate hearsay statements identifying the abuser. See, for example, United States v. Renville, 779 F.2d 430 (8th Cir. 1985); and United States v. Cree, 778 F.2d 474 (8th Cir. 1985). Moreover, courts have interpreted both the "excited utterance" and "residual" exceptions to enable juries to learn of a child's statements and, in many cases, both the allegations and recantations, and the circumstances surrounding them. See, for example, Lancaster v. People, 61 P.2d 720 (Colo. 1980); and United States v. Cree, supra. With faithfulness to traditional theories of evidence, and thorough and powerful reasoning, these courts have broadened the opportunity for juries to discover the truth. Like the Arizona Supreme Court, they have concluded:

> Sexual abuse of children is an old problem that society and the law have been late in recognizing and meeting. Fortunately, the rules of evidence... are flexible enough to meet the problem of child sexual abuse. State v. Robinson, 735 P.2d 801,813 (Ariz. 1987).

Most significant is the consistency of these hearsay interpretations with this Court's decision in United States v. Inadi, ___ U.S. ___, ___S.Ct.___, 89 L.Ed.2d 390 (1986). Re-examining the underpinnings of hearsay exception theory, the Court concluded "the 'Confrontation Clause's very mission' ...is to 'advance the accuracy of the truth-determining process in criminal trials. ....an unavailability rule is not likely to produce much testimony that adds anything to the 'truth-determining process.'" Inadi, at 398-399.

Critically, Inadi challenged the notion that just because a statement is made earlier, out of court, it is less relevant or trustworthy. In fact, the Court explained, some "statements derive much of their value from the fact they are made in a context very different from trial, and therefore are usually irreplaceable as substantive evidence." Inadi, at 399. That crucial insight held clear implications for child abuse and sexual assault cases where disclosures, allegations, and recantations are so important to a jury's understanding. Thus, Inadi's principles were

applied to child sexual assault cases. State v. Robinson, supra; Johnson v. State, 732 S.W. 2d 817 (Ark. 1987); Cogburn v. State, 732 S.W. 2d 807 (Ark. 1987).

3) Expert Testimony: In the last few years, courts have recognized the special expertise of various professionals who treat child victims, and who can help juries understand a child's behavior and non-verbal communication. Thus, testimony regarding the child abuse accommodation syndrome has helped juries understand delayed disclosure, recantation, and other behavior unfamiliar to the general public. In addition, experts have helped juries understand the unusual ways some children communicate, even if they cannot or will not speak. For example, in New Jersey a judge held extensive hearings to ascertain whether an art therapist should be recognized as an expert who could explain a child's communication through drawings. Allowing the testimony, the court concluded, "When appropriate, a court must act to introduce into the

corpus juris a new vehicle to use in its never ending search for the truth." Wilkerson v. Pearson, 210 N.J.Super 333,338-339 (1985).

4) Courtroom Techniques: Judges have learned that many children who might be able to testify will not testify because of the intimidating courtroom atmosphere. In adult-size surroundings, with strangers (some with guns, and one with witch-like robes), often deprived of the usual eating and napping schedule, a child often will freeze or become confused. Accordingly, courts have modified their settings, used videotape, dolls, and puppets, and even guaranteed a child's right to sit on a lap while testifying. Ohio v. Johnson, Case No. 85-5158, Court of Appeals, Stark County, Ohio, Fifth Appellate District, 6/9/86; and Wis. Stats. Sec. 967.04(8)(b)(8.).

With these techniques, judges have demonstrated faithfulness to trial traditions and the continuing obligation to monitor the methods of witness interrogation:

> Mode and Order of Interrogation and Presentation--controlled by Court. The court shall exercise reasonable

> control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of truth,...and (3) protect witnesses from harassment or undue embarrassment. Fed.R.Evid. 611(a).

With these techniques, judges have applied the implicit theories of Stincer and Inadi by shedding illogical assumptions about Sixth Amendment confrontation and, instead, focusing on the opportunity for juries to search for truth.

Perhaps the most significant courtroom method that blends the concepts of Stincer and Inadi is the use of one-way screens, mirrors, and closed-circuit television. In Stincer, when the defendant was not present during the child's testimony, the Court focused on whether "his presence would contribute to the fairness of the procedure." Stincer, at 647. Here, unlike Stincer, the defendant was present; only the child's knowledge of that presence was limited. In countless child abuse and sexual assault cases, the known presence of the defendant

not only would not "contribute to the fairness of the procedure," it would prevent the procedure from taking place. Thus, since Inadi and Stincer, courts consistently have approved one-way mirror and closed-circuit television procedures to assure the rights of both child witnesses and defendants. See, for example, Commonwealth v. Willis, Ky. 716 S.W.2d 224 (1986). As one court explained:

> ...the right to confront does not confer upon an accused the right to intimidate. The reliability of an abused child's testimony does not depend upon his or her ability to withstand the psychological trauma of testifying in a courtroom under the unwavering gaze of a parent who, although a possible abuser, has also been provider, protector, and parent. Commonwealth v. Ludwig, Superior Court of Pennsylvania, No. 02883, Philadelphia, 1987, p. 13.

CONCLUSION

Judges and other professionals throughout the country express their tremendous frustration over countless cases of child abuse and sexual assault that are not prosecuted. They speak not from speculation, but from actual

experiences with children whose abuse has been proven by medical evidence, often in juvenile court adjudications. No corresponding criminal prosecution goes forward because of the victim's inability to testify.

Examining the traditions of the trial and evidence law, exploring methods now possible with modern technology, expanding their own sensitivity to the special needs of child witnesses, legislators and judges have developed procedures not to favor children, but to remove discrimination against child witnesses. They have tried to allow children to be seen and heard without trauma and intimidation that would preclude testimony and trial. They have done so with attention to the Sixth Amendment rights of defendants. In their utilization of one-way screens, mirrors, and closed-circuit television, they have achieved the best possible opportunity for fairness for both victims and defendants; the best possible opportunity for juries to discover the truth.

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APPENDIX

APPENDIX

Conferences at which Judge Charles B. Schudson has presented keynote addresses, speeches, and seminars on laws and courtroom techniques in child abuse and sexual assault cases, 1984-87:

Alabama: Huntsville (February 1985); Madison County Child Advocacy Center and State of Alabama

Arkansas: Fayetteville (April 1987); Northwest Arkansas Task Force on Incest and Sexual Abuse

California: Palm Springs (May 1985); California Association of Supervisors of Child Care and Attendance

Florida: Miami (March 1986); University of Miami Conference on Family Violence

Georgia: Atlanta (October 1985); Briarcliff Psychological Center

Atlanta (April 1986); Georgia Council on Child Abuse

Illinois: Chicago (November 1985 and June 1987); National Conference on Missing and Exploited Children

Chicago (September 1986); Cook County Judicial Conference

Chicago (November 1985); National Center for Prevention of Child Abuse

Massachusetts: Boston (April 1986); Massachusetts Executive Office of Human Services

Michigan: Detroit (February 1986); Michigan Association of Children's Alliances

Mississippi: Jackson (April 1986); Mississippi Committee for Prevention of Child Abuse

Missouri: Lake of the Ozark (August 1986); Missouri Judicial Conference

Nevada: Reno (August and October 1986); National College of Juvenile Justice/ National Council of Juvenile and Family Court Judges

New Mexico: Albuquerque (April 1985); American Probation and Parole Association

Albuquerque (October 1985); American Public Welfare Association

North Carolina: Sneads Ferry (June 1987); North Carolina Judicial Conference

Ohio: Cincinnati and Columbus (August 1985); Ohio Association of Juvenile and Family Court Judges

Cleveland and Toledo (September 1985); Ohio Association of Juvenile and Family Court Judges

Oregon: Eugene (October 1985); Oregon Circuit Court Judicial Conference

Pennsylvania: Philadelphia (November 1986); Pennsylvania Judicial Conference

South Carolina: Charleston (April 1986); American Probation and Parole Association/ National Juvenile Court Services Association

Tennessee: Fall Creek Falls (April 1986); Tennessee Judicial Conference

Nashville (May 1986); Nashville Rape and Sexual Abuse Center

Washington, D.C.: (October 1984); National Symposium on Child Sexual Abuse; United States Department of Justice/ National Organization for Victim Assistance

Wisconsin: Racine (October 1987); American Judicature Society

Madison (October 1987); Midwest Conference on Child Sexual Abuse

Wyoming: Casper (November 1985); National Center for Missing and Exploited Children

Making Courts Safe for Children

Charles B. Schudson
Judge, Wisconsin Circuit Court

JOURNAL OF INTERPERSONAL VIOLENCE/March 1987

Peter was 6 years old when a babysitter ordered him and his 3- and 4-year-old brothers to their basement. The sitter threatened them with a knife, forced them to disrobe, and sexually assaulted Peter's little brothers. Police recovered the knife, with fingerprints of the suspect.

At the trial, despite sensitive questioning and careful use of anatomical dolls, Peter's brothers were unable to describe the assault. Peter was called to testify. Peter had seemed bright and articulate when, an hour earlier, he had visited the courtroom for orientation by the district attorney. Now, before the jury, he said nothing. He seemed confused and frightened, his eyes darting around the courtroom, his small body lost on what must have seemed an enormous chair. Peter nodded quickly when the judge said, "I'll bet you'd feel much

better if you were sitting on your Dad's lap." When his father sat in the witness chair and put Peter on his lap with his arm around Peter's tummy, Peter answered all questions about the sexual assaults.

Kelly was 6 years old when her mother, drying her after a bath, discovered Kelly's oozing, vaginal discharge. Answering her mother's question, Kelly exclaimed, "He hurt me. He hurt me. Kevin stuck his finger in me." Doctors confirmed that Kelly had suffered penetration, and had gonorrhea. Police also found that the suspect had been treated for gonorrhea during the same period.

At the trial, Kelly testified, but not in person. Kelly became the first child to testify through videotape under Wisconsin's new law permitting videotape depositions to be used in lieu of in-person testimony when (1) the defense has participated in the deposition by cross-examining the child, and (2) the judge finds that in-person testimony presents a substantial likelihood of

emotional harm to the child. Kelly gave her deposition in the comfort of judicial chambers just a few weeks after the assault, with the incident fresh in her memory. She was able to move about the floor and couch, holding toys while examined and cross-examined by the lawyers. Many months passed before the jury watched the videotape, but Kelly was able to continue therapy, unencumbered by anxiety about the trial.

Reflecting national concern about child abuse and sexual assault, legislatures and courts have developed laws and techniques to reduce trauma for children in court. In addition to videotape depositions before trial, closed-circuit television testimony at trial can protect the defendant's rights and reduce the child's fear. Closed-circuit television is particularly adaptable to courts because most have comfortable judicial chambers from which the child can testify without seeing the defendant. Appellate courts have approved this procedure, concluding that a defendant's right of "confrontation" does not necessarily include face-to-face confrontation.

Courts also have given more children their day in court as concepts of evidence evolve. By both legislative enactments and appellate decisions, many states now provide that a child's prior statements, like Kelly's to her mother, may be received in evidence as exceptions to laws excluding hearsay. Though some claim that this departs from traditional evidence law, appellate courts have clarified that admission in evidence of such statements to parents, doctors, therapists, and others is consistent with the traditional logic of "excited utterance" and "diagnosis or treatment" hearsay exceptions. Further, contrary to the assumptions and practices of many lawyers and judges, most state evidence codes have followed the federal rule that eliminated the "competency" requirement for a child. Years ago, a child who, like many philosophers, could not define the difference between truth and falsehood might have been disqualified from testifying. Now, while a child may not

understand the meaning of "swearing," a child can "promise" to tell the truth, and testify. The jury, then, can evaluate the child's credibility.

Although most legal controversy surrounds the use of videotape and closed-circuit and the law of hearsay and competence, perhaps the most important courtroom innovations are those of technique rather than law. While some children need videotape or closed-circuit TV to gain their day "in" court, many more will depend on flexible and sensible techniques when they testify <u>in</u> court. To communicate carefully and clearly, a child may have to sit on a parent's lap, hold a blanket or stuffed animal, or even play with toys or munch crackers during testimony. A child, silent on the witness stand, might speak from the floor with the trial participants sitting in a circle. To facilitate communication, puppets may be used for some children who are not accustomed to lawyers, but can give careful attention to Big Bird or Kermit the Frog.

To assure a fair trial, judges have special responsibility for child witnesses. The judge may remove robes if a child associates them with witches. Judges should ask about a child's eating and napping schedule. Judges must remember that a child may be alert and communicative at 9:00 a.m., but sleepy and anxious a few hours later. Judges should appreciate that, for a child, even 15 to 20 minutes on a witness stand may be unmanageable.

Some lawyers carelessly argue that such courtroom techniques take the side of the child. They fail to acknowledge that such techniques help a child communicate, but do not tell a child what to say. The techniques are analogous to providing a Spanish-speaking or hearing-impaired person with a translator, or allowing a disabled veteran to testify from a wheelchair. In fact, many lawyers enthusiastically endorse these evolving laws and techniques, realizing their potential value for child witnesses for the defense, or for plaintiffs in civil lawsuits.

None of these techniques supports the substance of a child's testimony. All of these techniques, however, reduce discrimination that has denied judges and juries the chance to hear a child's testimony.

The defendants who sexually assaulted Kelly and Peter's brothers were convicted. Despite the seriousness of those assaults, and the strong evidence corroborating Peter's and Kelly's accounts, neither case could have gone to trial without enlightened laws and techniques to assist children. While these laws and techniques did not give unfair advantage to Peter or Kelly, they did remove discrimination that would have denied them their day in court. That discrimination would have assured that two dangerous defendants, like so many others before them, could never have been brought to justice. Ending that discrimination against children is essential to preserving the traditional goal of a trial: the discovery of truth.

Note

1. The cases summarized are composites of actual cases that went to trial in Wisconsin Circuit Court, Branch I, for Milwaukee County, in 1984-1985, but the names of the children have been changed for this article.

AMICUS CURIAE

BRIEF

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No. 86-6757

In The
Supreme Court Of The United States

OCTOBER TERM, 1987

JOHN AVERY COY,
Appellant,

v.

STATE OF IOWA,
Appellee.

ON APPEAL FROM THE
SUPREME COURT OF IOWA

BRIEF FOR THE STATE OF CONNECTICUT and THE STATES OF CALIFORNIA, DELAWARE, INDIANA, NEW HAMPSHIRE, NEW MEXICO, OREGON, SOUTH CAROLINA, TENNESSEE, *AMICI CURIAE*, SUPPORTING AFFIRMANCE

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QUESTION PRESENTED

Whether the minimal restriction of confrontation that occurred when the child sexual assault victims testified in court behind a one-way screen was justified by considerations of public policy and the necessities of the case.

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INTEREST OF AMICI

Amici include states that have statutes that, like the Iowa statute in this case, seek to mitigate the psychological trauma experienced by child victims of sexual abuse when they are called upon to testify at the trial of their alleged abuser. These statutes restrict in some way the face-to-face encounter between the accused and the child victim. Amici also include states without such statutes that wish nevertheless to preserve the constitutional authority of their legislatures to enact them in the future.

Finally, all amici wish to preserve the inherent authority of their judiciary to employ, where appropriate, procedures similar to those used here in the elicitation of the testimony of child sexual assault victims. They recognize their compelling duty to protect the welfare of child sexual assault victims and share in their commitment to fundamentally fair criminal trials.

STATEMENT

Following a jury trial, the appellant was convicted of two counts of engaging in lascivious acts with a child, a violation of Iowa Code section 709, 8(1)(1985). He was sentenced to a term of imprisonment of ten years and ordered to pay government restitution in the amount of $5,268.50. J.A., Iowa Supreme Court, at 143-4. The Supreme Court of Iowa affirmed the conviction. *State v. Coy*, 397 N.W.2d 730 (Iowa 1987).

1. Evidence at the appellant's trial disclosed the following facts: In the early morning hours of August 3, 1985, the appellant entered a tent that two young girls had set up in the backyard of one of the girls' homes. He grabbed their throats, threatened to strike them if they would scream, ordered them to undress and proceeded to fondle them and to force them to perform fellatio on him. Trial Tr. at 41-45, 80-84. The appellant also made the girls kiss each other and told them that they should "[f]eel like you're enjoying it." Trial Tr. at 90. He then ordered them to urinate in his face, but when they could not, he urinated before them into a cup. Before leaving the tent, he tied the girls' hands behind their backs and directed them not to tell anyone what had happened, warning that if they would they would "have to go through a lot." Trial Tr. at 46, 85.

2. Prior to the appellant's trial the State sought, and was granted, permission to place a one-way screen in between the girls and the appellant as they testified. *State v. Coy*, 397 N.W.2d at 733. This screen enabled the appellant to view the two children, but prevented the children from seeing him. *Ibid.* The opportunity for cross-examination was unaffected by the device. The use of the screen was authorized, but not mandated, by Iowa Code § 910A.3(1) (Supp. 1985).

3. On appeal to the Iowa Supreme Court the appellant contended that the trial court had violated his due process and confrontation rights when it permitted the use of the screen over his objection. *State v. Coy*, 397 N.W.2d at 733. That court rejected his arguments. *Id.* at 733-35.

This appeal followed.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents questions of fundamental importance to the States. It requires the Court to strike a balance between the due process and confrontational rights of defendants accused of sexually abusing children and the interests of the States in protecting the fragile welfare of child victims of sexual crimes. This brief deals with the rights of defendants to confront the child witness under the Confrontation Clause of the Sixth Amendment.[1]

This Court has made it clear that, while the Confrontation Clause expresses a "preference" for the face-to-face encounter, there are "competing interests, [which] if 'closely examined' . . . may warrant dispensing with confrontation at trial." *Ohio v. Roberts*, 448 U.S. 56, 63 (1980). Thus, the preference for face-to-face confrontation " 'must occasionally give way to considerations of public policy and the necessities of the case.' " *Id.* at 64 (*quoting Mattox v. United States*, 156 U.S. 237, 243 (1895)).

In this case, a one-way screen was placed between the petitioner and the child witnesses as they testified at trial about the degrading sexual assault and general intimidation they were subjected to. The defendant viewed the witnesses, but they, while aware of his presence, could not see him. His opportunity for effective cross-examination was unrestricted.

Amici believe that the State's obligation to protect the psychological welfare of children who are sexually abused is compelling and amply justifies the limited nature of this restriction of customary confrontation. The rising incidence of child sexual abuse and the profound psychological scars that

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[1] Although this amicus brief addresses only the confrontation issue, amici subscribe fully to the State of Iowa's position on the due process issue. In fact, the compelling circumstances that warrant restriction of customary confrontation identified in this brief are no less significant to a determination of whether the appellant's right to a fair trial was abridged in this case.

abuse creates, both when it occurs and in the events that follow, are too well-documented to be ignored. A humane judicial system simply cannot unnecessarily add to the child victim's trauma.

The interests safeguarded by the Confrontation Clause were fully protected in this case. The professional data indicates that, rather than diminishing the reliability of the child's testimony, procedures that curtail the face-to-face encounter actually enhance reliability. The ultimate test for reliability, the opportunity for cross-examination, remained unaffected by the procedure used. *See Kentucky v. Stincer,* 482 U.S. ____, 107 S.Ct. 2659, 2664 (1987).

The appellant contends that the Iowa statute authorizing use of the one-way screen violates confrontation rights because it does not require a specific showing of necessity. What the statute does is to create a rebuttable presumption of need, based no doubt on the legislature's assessment of the social science data that convincingly supports such a presumption. The statute confers discretion upon the trial court, and so, affords the defense an opportunity to persuade it that alternative procedures for presenting the child's testimony are not warranted in the particular case. This presumption is not unlike the presumption that evidence falling within an established exception to the hearsay rule possesses adequate indicia of reliability, or that children under a certain age lack the maturity to consent to sexual relations. It is not unreasonable. The appellant, having failed to persuade the trial court that the procedure was not called for in this case, has not been able to overcome the general legislative finding of psychological harm and corresponding necessity.

The Constitution requires no more.

ARGUMENT

THE MINIMAL RESTRICTION OF CONFRONTATION THAT OCCURRED WHEN THE CHILD SEXUAL ASSAULT VICTIMS TESTIFIED BEHIND A ONE-WAY SCREEN WAS JUSTIFIED BY CONSIDERATIONS OF PUBLIC POLICY AND THE NECESSITIES OF THE CASE

A. Nature Of The Right Of Confrontation

The Sixth Amendment's Confrontation Clause made applicable to the States through the Fourteenth Amendment; *Pointer v. Texas,* 380 U.S. 400, 403–405 (1965); provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const., amend. VI. The origin of the clause sheds light upon its intended object and subsequent application. The

> particular vice that gave impetus to the confrontation claim was the practice of trying defendants on "evidence" which consisted solely of *ex parte* affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact. Prosecuting attorneys "would frequently allege matters which the prisoner denied and called upon them to prove. The proof was usually given by reading depositions, confessions of accomplices, letters, and the like; and this occasioned frequent demands by the prisoner to have his 'accusers,' i.e. the witnesses against him, brought before him face-to-face. . . ."

California v. Green, 399 U.S. 149, 156–57 (1970); *see also Mattox v. United States,* 156 U.S. 237, 242–43 (1895). The hated practice of trial by *ex parte* affidavits and depositions, thus,

prompted the Framers to place within the Bill of Rights the Sixth Amendment's guarantee of witness confrontation in criminal trials. Speaking of the scope of the protection, this Court has said that the Confrontation Clause "envisions 'a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face-to-face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.' " *Ohio v. Roberts*, 448 U.S. 56, 63–64 (1980) (*quoting Mattox v. United States*, 156 U.S. 237, 242–43 (1895)). In *Pennsylvania v. Ritchie*, 480 U.S. ____, 107 S. Ct. 989, 998 (1987), Justice Powell, speaking for the plurality, summarized the protection by saying: "The Confrontation Clause provides two types of protection for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination."

Yet the clause has never been accorded a literal meaning, for to do so would require the exclusion of any out-of-court statement and "would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme." *Ohio v. Roberts*, 448 U.S. at 63. As this Court recognized in *Mattox*, "[a] technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused, and farther than the safety of the public will warrant." *Mattox v. United States*, 156 U.S. at 243.

The decisions of this Court have, instead, made it "clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of [any out-of-court statement].' " *Dutton v. Evans*, 400 U.S. 74, 89 (1970) (*quoting California v. Green*, 399 U.S. 149, 161 (1970)). Thus, although the clause expresses a "preference for face-to-face confrontation at trial"; *Ohio v. Roberts*, 448 U.S. at 63; it does

not command it. There are "competing interests, [which] if 'closely examined' . . . may warrant dispensing with confrontation at trial." *Id.* at 64. Though the right of confrontation is of undoubted value to the accused, it "must occasionally give way to considerations of public policy and the necessities of the case." *Mattox v. United States*, 156 U.S. at 243 (*quoted with approval in Ohio v. Roberts*, 448 U.S. at 64). As this Court observed in *Douglas v. Alabama*, 380 U.S. 415 (1965), "an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation." *Id.* at 418.

Hence, many of the exceptions to the hearsay rule, which itself springs from similar concerns, have been found to be constitutionally unobjectionable, not because admission of hearsay evidence satisfies the literal language of the Confrontation Clause, but because hearsay exceptions are generally based on some demonstrated need and allow for the admission only of evidence that possesses substantial guarantees of trustworthiness. *See Ohio v. Roberts*, 448 U.S. at 65–6. Dying declarations; *Mattox v. United States*, 156 U.S. 237 (1895); testimony presented at a prior adversarial hearing; *Ohio v. Roberts*, 448 U.S. 56 (1980); *California v. Green*, 399 U.S. 149 (1979); *Barber v. Page*, 290 U.S. 719 (1968); and statements of co-conspirators; *United States v. Inadi*, 475 U.S. ____, 106 S. Ct. 1121 (1986); to name a few, may under appropriate circumstances be admitted into evidence notwithstanding the absence of face-to-face confrontation with the out-of-court declarant. As Professor Wigmore has observed, "[n]o one has doubted that [face-to-face confrontation] is highly desirable, if only it is available. But it is merely desirable. Where it cannot be obtained, the requirement ceases." 5 Wigmore, Evidence § 1395 (Chadbourn rev. 1974).

Nevertheless, as the Court recognized in *Roberts*, the Confrontation Clause "envisions" personal examination and cross-examination of the witness in the presence of the jury, the "face-to-face" encounter. *Ohio v. Roberts*, 448 U.S. at 63–4. "Most believe that in some undefined but real way recollection,

veracity, and communication are influenced by face-to-face challenge. This feature is a part of the sixth amendment right additional to the right of cold, logical cross-examination by one's counsel." *United States v. Benfield*, 593 F.2d 815, 821 (8th Cir. 1979) (videotaped deposition of adult witness that defendant was not present at and could not participate in violated Sixth Amendment). Few would deny that an accusation made in an informal setting might not be sworn to in open court, attended by the full majesty and dignity of a judicial proceeding, before the accused and the jury who must decide his fate.[2] *See Ohio v. Roberts*, 448 U.S. 56, 63 n.6 (1980).

Having acknowledged, however, that the face-to-face challenge is an ordinary component of the confrontation guarantee, it remains to determine whether that confrontation interest must "give way to considerations of public policy and the necessities of [this] case." *Mattox v. United States*, 156 U.S. at 243; *see* note, *The Testimony of Child Victims In Sex Abuse Prosecutions: Two Legislative Innovations*, 98 Harv. L. Rev. 806, 823 (1985). The analysis must first take into account the limited extent of the restriction involved here.

B. The Limited Nature Of The Restriction

As the statement of facts above makes clear, the restriction of the face-to-face challenge in this case was limited indeed. The appellant saw the witnesses testify contemporaneously through the one-way screen; he could observe their

[2] It is not correct to say, however, that the Confrontation Clause creates a right to an "eyeball-to-eyeball" courtroom encounter. Several courts have expressly rejected such arguments. They point out that a witness need not look at the accused while testifying and that any such rule would, of course, disallow the testimony of blind witnesses. *See State v. Cooper*, 353 S.E.2d 451, 454 (S.C. 1987); *Commonwealth v. Willis*, 716 S.W.2d 224, 231 (Ky. 1986); *State v. Sheppard*, 197 N.J. Super. 411, 484 A.2d 1330, 1343 (1984); *cf. State v. Jarzbek*, 204 Conn. 683, 529 A.2d 1245 (1987) (majority recognizes right to "eyeball-to-eyeball" confrontation over vigorous dissent).

demeanor, hear their responses, and was able to communicate simultaneously with his attorney. *Cf. Powell v. State*, 694 S.W.2d 416, 420-21 (Tex. App. 1985) (defendant not afforded opportunity to participate in cross-examination of child by consulting with attorney; confrontation rights violated). Likewise, the jury was able to observe the witnesses to evaluate their responses (verbal and non-verbal) to both direct and cross-examination. *See State v. Hewett*, 86 Wash. 2d 487, 492, 545 P.2d 1201 (App. Ct. 1976).

Most importantly, the procedure used regulated, not the content of the testimony, but merely its means of presentation. The defendant was given unlimited opportunity to cross-examine the witnesses. The opportunity of cross-examination is "[t]he main and essential purpose of confrontation." *Kentucky v. Stincer*, 482 U.S. ___, 107 S. Ct. 2659, 2666 (1987); *Delaware v. Van Arsdall*, ___ U.S. ___, 106 S. Ct. 1431, 1435 (1986); *Davis v. Alaska*, 415 U.S. 308, 315 (1974). Cross-examination has been described as the " 'greatest legal engine ever invented for the discovery of the truth.' " *California v. Green*, 399 U.S. at 159 (*quoting* 5 Wigmore on Evidence § 1367 (McNaughton rev. 1974)). As Professor Wigmore has pointed out, the right of confrontation is not for the purpose of staring idly at the witness, but to probe the witness' testimony in such a way as to test its reliability. *See* 5 Wigmore on Evidence § 1395 (Chadbourn rev. 1974); *Davis v. Alaska*, 415 U.S. 308, 316 (1974). This fundamental object of the confrontation guarantee was fully implemented in this case.

The limited nature of the restriction here perhaps can best be appreciated by comparison. Surely, the procedure employed for presenting the testimony of the child-witnesses in this case is much to be preferred over the admission of a dry transcript of prior testimony read by a prosecutor; *Commonwealth v. Willis*, 716 So.2d 224, 231 (Ky. 1986); *United States v. King*, 552 F.2d 833, 841 (9th Cir. 1976); *Commonwealth v. Stasko*, 471 Pa. 373, 370 A.2d 350, 355 (1977); Parker *Rights of Child Witnesses: Is the Court a Protector or Perpetrator*, 17 New Eng. L. Rev. 643, 700 (1981); or the admission of an uncross-examined dying declaration. *See Mattox v. United States*, 156 U.S. at 242.

In sum, the restriction of confrontation interests here did not affect in any way the scope of cross-examination or the opportunity of the jury and the defendant to observe the witnesses and to assess their demeanor; nor did it interfere with the defendant's right to communicate with counsel or participate in his defense. *Cf. State v. Sheppard*, 484 A.2d at 1342–43. It simply allowed for the child witnesses to testify without having to confront face-to-face the accused.

C. The State's Compelling Need To Protect The Psychological Welfare Of Child Sexual Assault Victims

The shocking rise in the incidence of child sexual abuse in this Country is a national disgrace. Statistics that derive from *reported* cases reveal that a sharp increase in the incidence of child sexual abuse on the national level continues from year to year. *See* American Association for Protecting Children, *Highlights of Official Child Neglect and Abuse Reporting 1985*, 16 (1987) (by 1985, 12 percent of the over 1.9 million reported child maltreatment cases involved sexual abuse allegations) (hereinafter *"Highlights"*); D. Finkelhor, *Child Sexual Abuse* 1 (1984); Ordway, *Parent-Child Incest: Proof at Trial Without Testimony in Court by the Victim*, 15 U. Mich. J. of L. Reform 131 n.5 (1981); *State v. Sheppard*, 484 A.2d at 1334. From 1976 through 1985 the incidence of sexual abuse per 10,000 children increased from less than 1% to 17.9%. *See Highlights* at 16.

The history of sexual abuse in Connecticut, for example, is typical. The number of reported cases of abuse has risen at an alarming rate in the past three years. Connecticut Child Sexual Abuse Task Force, Final Report 5 (1986). In fact, the number of confirmed cases of sexual abuse per year has more than doubled since 1983. *Id.* at 5. Fletcher, N. Fuzesi, A. Sayer, H. Ward, *Growing Up at Risk In Connecticut* 56 (1984).

The incidence of actual (as opposed to reported abuse) are unquestionably greater, since an unknown but undoubtedly substantial percentage of child sexual abuse cases is never reported. *See* D. Finkelhor, *Child Sexual Abuse*, 1, 35 (1984) ("[w]e now know much better than before how widespread sexual abuse is and how small a fraction of offenders are ever apprehended, let alone convicted"); D. Finkelhor, *Sexually Victimized Children* 53 (1979). As this Court has only recently observed, "child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim." *Pennsylvania v. Ritchie*, 480 U.S. ____, 107 S. Ct. 989, 1003 (1987). The typical delay in the reporting of these crimes and its effect on prosecution also is well-documented. S. Butler, *The Conspiracy of Silence* (1978).

These statistics are all the more disturbing in light of the fact that the great majority of perpetrators of child sexual abuse are family members or other trusted individuals who have ready access to their child victims. S. Sgroi, *Handbook of Clinical Intervention in Child Sexual Abuse*, 13 (1982); Conte & Berliner, *Sexual Abuse of Children: Implications for Practice*, J. Comtemp. Soc. Work 601, 603 (1981). Many of the abusers are parents or persons in parental roles. *Ibid.* In reporting such cases the child is thrust into an emotional tug-of-war of extraordinary dimensions. On the one hand, the child cannot ignore the natural love, dependence, and trust that inheres in the parent-child relationship. On the other, the child is plagued by the guilt attending the sexual act, the guilt associated with the perceived betrayal of the abusing parent, the difficulty of condemning the apparently affectionate act of a parent, and the many pressures, both positive and negative, that may be exerted by other family members. Many child victims are exposed to intense pressure by the abuser or the other parent to recant charges for the sake of preserving the family unit. *See* S. Butler, *The Conspiracy of Silence* (1978); note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 Harv. L. Rev. 806, 807, 807 n.14 (1985); MacFarlane, *Diagnostic Evaluations and the*

Use of Videotapes in Child Sexual Abuse Cases, 40 U. Miami L. Rev. 135, 141 (1985). State agencies aware of such tactics may elect to separate the child temporarily even from the non-abusing parent, further threatening the child's sense of security. Ordway, *Parent-Child Incest, supra*, 133; *see note, Developments in the Law — The Constitution and the Family*, 93 Harv. L. Rev. 1156, 1320 (1980) (removal from the home, even a bad home, may cause "serious psychological injury").

In addition, child sexual abuse victims frequently are threatened by the abuser with physical harm if the conduct is reported. The fear generated by an adult's threat to a young and relatively helpless child cannot be underestimated. Added to this must be the ordinary reticence one experiences in the discussion of intimate sexual activity and the embarrassment of disclosing such matters to police and prosecutors. *See generally, State v. Sheppard*, 484 A.2d at 1344; *see also* Ordway, *Parent-Child Incest, supra*, at 134–5.

Moreover, the consequences of sexual abuse for the child, for the child's family and for society in general are devastating. Children who are the victims of sexual abuse frequently suffer a variety of psychological problems, including guilt, fear, depression, low self-esteem and repressed anger. Many victims suffer from these problems throughout their lives. S. Sgroi, *Handbook of Clinical Intervention in Child Sexual Abuse* 109–141 (1982). Most tragically, victims of sexual abuse often become abusers themselves when they reach adulthood. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 Child Abuse and Neglect 177, 183 (1983).

One must also consider the child who enters the judicial process. If the child is treated like any ordinary witness she is brought into an adult-sized courtroom that is meant to impress adults, exposed to the penetrating gaze of the jury, the clerk, the court reporter, uniformed sheriffs, members of the public and press, a robed magistrate, and not least, the foreboding gaze of the abuser. She must undergo examination and cross-examination in this setting and relive in the

greatest detail sexual encounters that have had such a negative and pervasive effect upon her life.

The results are predictable. Frequently, the custodial parent or guardian will simply not allow the child to testify. *See Testimony of Child Victims, supra*, 98 Harv. L. Rev. at 807. Or, if the child does attempt to testify, she will "freeze" under the pressure of the moment, or will testify in a halting, fragmented or confused manner.[3] *See State v. Sheppard*, 484 A.2d at 1333. But even if the testimony is thus obtained, the emotional scars that the experience will have left are incalculable. The victim is, in effect, twice victimized, once by the abuser and again by the judicial system. *See* Avery, *The Child Abuse Witness: Potential for Secondary Victimization*, 7 Crim. Just. J. 1, 3–4 (1983); Parker, *The Rights of Child Witnesses: Is the Court Protector or Perpetrator*, 17 New Eng. L. Rev. 643, 647–56 (1982); Melton, *Psychological Issues in Child Victim's Interaction with the Legal System*, 5 Victomology 274–275 (1980); S. Katz & M. Mazur, *Understanding the Rape Victim* 200 n.4 (1979) (child sex victims who participate in judicial proceedings suffer more deleterious effects and psychological harm than children who do not); Mahady-Smith, *The Young Victim as Witness for the Prosecution: Another Form of Abuse?*, 89 Dick. L. Rev. 721 (1975); Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 Wayne L. Rev. 977 (1979).

These results are intolerable in a civilized society.

They are wholly uncharacteristic of our Nation's solicitude for children. As other states have, Connecticut has devoted a department of government to the protection and welfare of children. *See* Conn. Gen. Stat. §§ 17-411, 17-412 (1987) (establishing the Department of Children and Youth

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[3] Sometimes, young child victims "completely shut[ ] down all communication on the subject and refuse to answer any further questions." MacFarlane, *Diagnostic Evaluations and the Use of Videotapes in Child Sexual Abuse Cases*, 40 U. Miami L. Rev. 135, 137 (1985).

Services). Laws permit state officials to intervene in a family setting dangerous to a child's welfare and, if necessary, to remove the child from the home. *Id.* § 46b-129 (1987). Even the sacred parental relationship can be dissolved by the state where cause exists and the best interests of the child would thus be advanced. *Id.* at § 17-43a (1987). Decisions concerning the custody and care of children are made on the basis of the best interests of the child. *See Ridgeway v. Ridgeway*, 180 Conn. 533, 541, 429 A.2d 801 (1980); Conn. Gen. Stat. § 46b-56(b) (1987). Crimes against children are given a special status owing to the child's unique vulnerability. *See, e.g.*, Conn. Gen. Stat. § 53-21 (1987) (risk of injury to, impairing morals of child); § 53-23 (1987) (abandoning child under age of six); § 53a-71(a)(1) (1987) (sexual intercourse with person under fifteen years of age), (4) (sexual intercourse with person less than eighteen years of age by guardian); § 17-38a(b) (1987) (failure to report child abuse). An entire judicial process, with special juvenile defenders, prosecutors, probation officers, and judges, has been in place for many years in Connecticut to safeguard the unique needs of children. *See* Conn. Gen. Stat., chapter 815t (1987). Court proceedings for juveniles are conducted in private without the formality of the adult criminal process and in a setting that minimizes the intimidation that usually attends the trial courtroom. *Id.* § 46b-122 (1987). Economic support is provided for needy children, and a free public education is guaranteed. *See id.* § 17-32(b) (1987); Conn. Gen. Stat., chapter 299, part I (1987); Conn. Const., art. I, § 8.

These typical laws, government programs, and facilities testify to the special status of children in our society. They speak of the commitment the States have made to protect and defend from harm these most vulnerable of its citizens. Surely, that commitment does not evaporate when the child becomes the alleged victim of so harmful a crime as sexual abuse, as the many statutes authorizing procedures similar to that employed here demonstrate.[4] Yet, unless the child abuse victim

[4] Statutes authorizing special treatment of child sexual assault victims when they provide evidence of abuse at trial are collected in the Appendix to the Amicus Curiae Brief of the American Bar Association.

is accorded special treatment when testifying in our criminal courts, we will either be deprived of that testimony, and so indirectly encourage such crimes, or risk both short and long-term psychological damage to the child victim.[5] *See State v. Messier*, 101 N.M. 582, 586, 686 P.2d 272 (1984).

D. The Legislative Finding Of Compelling Need Is Sufficient To Justify The Procedure Used

The appellant nevertheless contends that the procedure employed violated his confrontation rights because it was not supported by a specific factual basis establishing an "essential state interest" that could not otherwise be protected. *See* Appellant's Brief at 40–42. He contends that an inquiry must be made in each case to ascertain whether such a procedure is essential to protect the child's welfare. *Ibid.*

It is true that the restriction of some constitutionally protected interests must be justified by a specific factual showing.[6] For example, the press and public may not be excluded from court during the testimony of child victims of sexual assault based upon an irrebuttable legislative presumption of necessity. *Globe Newspaper Company v. Superior Court*, 457 U.S. 596, 607–11 (1982). Because an absolute rule would abrogate completely the public right of access in cases in which such measures are not essential, a case by case assessment of

[5] As two writers have observed, the secretive nature of the crime of child sexual abuse usually results in little or no corroborative evidence, rendering the testimony of the victim "absolutely critical to the prosecution." McGrath & Clemens, *The Child Victim As a Witness in Sexual Abuse Cases*, 46 Mont. L. Rev. 229, 230, 232 (1985); *see also* Jones & McGraw, *Reliable and Fictitious Accounts of Sexual Abuse to Children*, 2 J. Interpersonal Violence 27, 35 (March 1987).

[6] Whether one views the state action affecting the constitutional right as a "restriction" upon the right or as action that the constitutional right does not forbid is not analytically significant in this context. The fact is that, when the competing interests are considered, the constitutional right of the accused does not prevail.

necessity, supported by specific factual findings, is required to justify the drastic action of closure. *Id.* at 611 n.27.

Nevertheless, there are other restrictions on constitutional guarantees that may, as a matter of course, be permitted based on generalized principles of necessity. Perhaps the most obvious, and pertinent, examples can be found in the many hearsay exceptions. There is little question that hearsay exceptions authorize a departure from conventional confrontation, for the "accuser" does not appear in the courtroom even though he may be available to do so. *See e.g., United States v. Inadi,* 475 U.S. ____, 106 S. Ct. 1121 (1986) (co-conspirator's statements admissible regardless of his availability as a witness). These departures from the constitutional norm or "preference"; *Ohio v. Roberts,* 448 U.S. 56, 63 (1980); are allowed because generalized principles of necessity and trustworthiness support them.

Nevertheless, no one would suggest that all dying declarations are reliable; *see* Fed. R. Evid. 804(b)(2); or that all regularly prepared business records are free from error; *see* Fed. R. Evid. 803(6); or that all the statements made by a patient to a treating physician are necessarily truthful. Fed. R. Evid. 803(4). Yet, the restrictions of conventional confrontation rights permitted by these frequently invoked hearsay exceptions are supported, not by fact-specific showings in each case, but by reasonable legislative or judicial presumptions. *See Francis v. Franklin,* 471 U.S. 307, 313 (1985) (evidentiary presumptions). These presumptions, when reasonable, are entitled to judicial recognition. *Id.* at 314–315.

An analogous legislative presumption in the area of child welfare can be found in universally adopted statutory rape laws. They vitiate any purported consent to sexual relations that a child under a particular age may have given. *See, e.g.,* Conn. Gen. Stat. § 53a-71(a)(1) (1987). Thus, in Connecticut, all persons who engage in consensual sexual intercourse with a fifteen year old who is one day from his or her sixteenth birthday have committed a class C felony punishable by a sentence

of up to ten years in prison; the same act, committed the next day, is not a crime at all. Surely, an argument could be made that a case-specific inquiry about the maturity, knowledge, and experience of the teenager would better protect the due process and equal protection rights of defendants accused of statutory rape, as well as the welfare of children. Experts, no doubt, differ on the issue generally and would likely differ as to any particular case. But the fact-specific inquiry has never been required in this context; the legislative irrebuttable presumption of immaturity and corresponding harm to the child is generally reasonable and, therefore, enforceable.[7] *See Schwartzmiller v. Gardner,* 567 F. Supp. 1371, 1379–80 (D. Idaho 1983); *Payne v. Commonwealth,* 623 S.W.2d 867 (Ky. 1981) (irrebuttable presumption of immaturity); *People v. Dozier,* 72 App. Div.2d 478, 424 N.Y.S.2d 1010, *aff'd,* 52 N.Y.2d 781, 52 N.Y.S.2d 620 (1980). As this Court has said addressing a classification based on age: "We do not demand of legislatures 'scientifically certain criteria of legislation.' " *Ginsberg v. New York,* 390 U.S. 629, 642–43 (1968) (legislative conclusion that certain sexually oriented material would be harmful to minors).

This case calls for a similar rule. Surely, the legislature is entitled to presume that child victims of sexual assault are more likely to (1) come forward, (2) give more reliable testimony, and (3) suffer less psychological harm if they are allowed to testify at trial without having to be face-to-face with the person they claim abused them.

While similar legislative presumptions in *Globe* were not found to be sufficient to justify an absolute rule, this case is far different from *Globe.* In *Globe* the press and public were totally excluded from a portion of a criminal trial. Surely, the total exclusion of a defendant from a portion or all of his criminal trial falls into the same category as *Globe;* it cannot be

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[7] Needless to say, the consequence of an irrebuttable presumption in the context of statutory rape is far more significant than the consequence of the legislative rebuttable presumption involved in this case.

sustained absent the finding of specific facts justifying such action. *Cf. Kentucky v. Stincer,* 482 U.S. ____, 107 S. Ct. 2658, 2667 (1987) (where pre-trial competency hearing bears "a substantial relationship to the defendant's opportunity to defend," he may be excluded from trial only where his role in assisting in his defense is outweighed by "the risk of identifiable and substantial injury to the specific child witness"); *Illinois v. Allen,* 397 U.S. 337 (1970) (disruptive defendant may be removed from courtroom). But this case does not involve such drastic state action. No one was excluded from court. Rather, only the means of presenting evidence at trial was altered.

Moreover, the Iowa statute involved in this case does not mandate use of the procedure employed here. It confers authority upon the court to do so and allows the exercise of discretion. *See* Iowa Code § 910A.3(1) (Supp. 1985) (court "may require" alternate procedure). The statute, in essence, creates a rebuttable presumption that children under the age of fourteen who are the victims of sexual abuse will suffer psychological harm and trauma if forced to confront face-to-face their abusers. On the basis of the social science data that is available, this conclusion surely cannot be described as arbitrary or unreasonable.

In any event, the defendant is free to attempt to persuade the court that in the particular case before it the procedure is unwarranted. Placing the burden on a defendant to rebut a reasonable and justified presumption does not violate due process rights. *See Ulster County Court v. Allen,* 442 U.S. 140, 157-163 (1979).

E. Attendant Guarantees Of Trustworthiness

As Confrontation Clause analysis makes clear, any restriction of the conventional scope of the face-to-face encounter the clause envisions must be justified both in terms of the need for the restriction and the adequacy of alternative means of guaranteeing trustworthiness. *See Ohio v. Roberts,* 448 U.S.

56, 66 (1980). Since the "very mission" of the clause is to " 'advance "the accuracy of the truth-determining process in criminal trials" ' "; *United States v. Inadi,* 475 U.S. ____, 106 S. Ct. 1121, 1127 (1986) (citations omitted); the inquiry where a restriction of conventional confrontation is advanced must focus on the indicia of reliability the proffered evidence possesses. *See ibid; Lee v. Illinois,* 476 U.S. ____, 106 S. Ct. 2056, 2062 (1986).

Ordinarily, the question is whether hearsay evidence of some sort will be admitted without any opportunity for the defendant to confront the declarant, and whether adequate indicia of trustworthiness exist. *See Lee v. Illinois,* 476 U.S. ____, 106 S. Ct. 2056, 2062 (1986); *Ohio v. Roberts, supra.* That is not the case here, for the testimony of the children was presented during a session of court at which the witnesses were subjected to cross-examination, the most fundamental test of trustworthiness.[8] The analysis must thus begin with the observation that the principal guarantee of trustworthiness, cross-examination, is present in this case. *Kentucky v. Stincer,* 482 U.S. ____, 107 S. Ct. 2658, 2666 n.17 (1987) (opportunity for effective cross-examination satisfies Confrontation Clause even in the absence of face-to-face encounter).

The question, instead, is whether the reliability of the witnesses' testimony is significantly diminished when it is given without a face-to-face encounter with the accused. Amici contend that the reliability of the child's testimony is actually enhanced by this alteration of the ordinary circumstances under which testimony is elicited in our criminal courts. *Cf. United States v. Inadi,* 106 S. Ct. at 1127 (admission of co-conspirator's out of court declarations "actually furthers" truth-finding object of Confrontation Clause).

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[8] The use of the one-way screen under these circumstances is, thus, to be distinguished from evidentiary rules that allow for the admission of the hearsay statements of child victims. *See generally,* Yun, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases,* 83 Colum. L. Rev. 1745-1766 (1983).

With respect to the ordinary adult witness, testifying before the accused usually serves to enhance the reliability of the evidence presented. The face-to-face encounter is intended to do just that. *See Ohio v. Roberts*, 448 U.S. at 63 n.6.

But the face-to-face challenge does not have the same effect on child witnesses. Adult witnesses, though rendered nervous and somewhat uncomfortable by the courtroom setting and traditional procedures, will nevertheless usually be able to appreciate their purpose and be influenced positively thereby.[9] The young child witness will not. The summarized testimony of one expert, which was relied upon by the trial and appellate courts considering the use of videotaped testimony of the child victim, helps to illumine the subject:

> An adult witness, testifying in court, surrounded by the usual court atmosphere, aware of a black-robed judge, a jury, attorneys, members of the public, uniformed attendants, a flag, and religious overtones, is more likely to testify truthfully. The opposite is true of a child, particularly when the setting involves a relative accused by her of sexual abuse. She becomes fearful, guilty, anxious, and traumatized. In most cases, she will have been exposed to both pleasant and abusive associations with the accused. As a consequence, she has ambivalent feelings. Anger against the relative is opposed by feelings of care, not only for him but also for other family members who may be harmed by a conviction. There is guilt as well as satisfaction in the prospect of sending the abuser to prison. These mixed feelings, accompanied by the fear, guilt, and anxiety, mitigate the truth, producing inaccurate testimony. The video arrangement, because it avoids courtroom stress, relieves these feelings, thereby improving the accuracy of the testimony.

State v. Sheppard, 484 A.2d at 1332; *see* Ordway, *Parent-Child Incest, supra*, 137–8; *see also*, Avery, *The Child Abuse Witness: Potential for Secondary Victimization*, 7 Crim. Just. J. 1, 3–4 (1983).

It would appear that the very features the Confrontation Clause envisions as enhancing the truthfulness of testimony would, in the unique circumstances of child sexual abuse cases, have the opposite effect. As the Supreme Court of Kentucky recently observed: "Ironically, putting the child through the ordeal of testifying in open court [before the accused] may denigrate the reliability of her testimony." *Commonwealth v. Willis*, 716 S.W.2d 224, 230 (Ky. 1986) (*citing* Ordway, *op. cit.* at 132).

The appellant suggests, nevertheless, that the potential for psychological harm was less here because the victims were not able positively to identify their assailant. Appellant's Brief at 4 n.6. Such a distinction is illusory. Fear and anxiety arise in these cases because of the unique vulnerability of the child, especially when challenging an adult, the guilt a child carries from the act, and the embarrassment she experiences in recounting it.[10] *See State v. Tafoya*, 105 N.M. 117, 729 P.2d 1371 (Ct. App.), *cert. denied*, 105 N.M. 94, 728 P.2d 845 (1986), *pet. for cert. filed*, 55 U.S.L.W. 3608 (U.S. Feb. 12, 1987) (No. 86-1343). Although procedures like the one used here will not avoid these feelings, they surely will ameliorate them. In any event, these intense emotions will exist regardless of the admissibility of an identification by the child. It is enough that the child knows that she is accusing an adult of a serious and degrading crime for which she may feel partly responsible.

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[9] Even so, the admonition that a victim-witness should relax and speak without anxiety is so frequently heard in our courtrooms as to demonstrate the profound effect the judicial setting and the face-to-face encounter has on the majority of adult victims. *See* Ordway, *Parent-Child Incest, supra*, 134.

[10] Children who have been sexually abused almost invariably experience guilt because they typically do not resist the sexual advances of the accused. They simply do not have the moral self-confidence to condemn or resist the sexual conduct of an adult, yet retain the inner conviction that it was wrong. They are also usually no physical match for their assailant. *See generally* V. DeFrancis, *Protecting the Child Victim of Sex Crimes* 3 (1969).

F. The Culpability Of The Defendant In Intimidating The Witnesses

The analysis would not be complete without consideration of the defendant's role in ordering the witnesses not to report to others the conduct involved and the general intimidation he visited upon them. The evidence indicated that the defendant told the victims not to tell anybody because [they would] have to go through a lot [if they did]." Trial Tr. at 46, 85. The victims were shaking throughout the assault and, after the defendant tied their arms behind them, were too "scared" to try and leave the tent in which they were assaulted. *Id.* at 45-47, 85-86.

Our law has long recognized that an accused may, by his conduct, forfeit or constructively waive his right to confront his accusers. The disruptive defendant may be removed forcefully from the courtroom. *See Illinois v. Allen*, 397 U.S. 337, 342-43 (1970). Similarly, the defendant who threatens and intimidates a witness may by that conduct forfeit his right of personal confrontation. *See State v. Altrui*, 188 Conn. 161, 173-4, 448 A.2d 837 (1982). As the Eighth Circuit ruled in a case involving witness intimidation, "the sixth amendment does not stand as a shield to protect the accused from his own misconduct or chicanerv." *United States v. Carlson*, 547 F.2d 1346, 1359 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977) (forfeiture of right of confrontation found). *Accord Black v. Woods*, 651 F.2d 528 (8th Cir.), *cert. denied*, 454 U.S. 847 (1981); *United States v. Balano*, 618 F.2d 624 (10th Cir. 1979), *cert. denied*, 449 U.S. 840 (1980); *State v. Sheppard*, 484 A.2d at 1345-1348. "There is a difference between confrontation and intimidation"; *Commonwealth v. Willis*, 716 S.W.2d at 230-31; and while the Constitution protects the former, it offers no license to engage in the latter.

The defendant's own conduct cannot be ignored in assessing the need for the procedures employed here. Surely, courts should not be receptive to confrontation claims in this context when the very reason for the alternative procedure used in

eliciting the testimony of the child was necessitated in part by the defendant's own intimidating conduct. *See State v. Altrui, supra.* And, while a judge acting upon a pre-trial motion to avoid face-to-face confrontation should not presume the defendant's guilt, strong evidence of victim intimidation in the commission of the crime ought to be a factor that is taken into account when considering the "necessities of the case." *Ohio v. Roberts*, 448 U.S. 56, 64 (1980).[11]

G. Balancing The Competing Interests Involved

Examination of the competing interests involved in this case leads to one inescapable conclusion: the appellant's confrontation rights under the United States Constitution have not been violated. *See Commonwealth v. Ludwig*, No. E1003, *slip op.* at 16 (Pa. Super. Sept. 8, 1987) (*en banc*); *Commonwealth v. Willis, supra; Chappel v. State*, 18 Ark. App. 26, 710 S.W.2d 214 (1986); *State v. Daniels*, 484 So.2d 941 (La. App. 1986); *State v. Melendez*, 135 Ariz. 390, 661 P.2d 654 (Ct. App. 1983); *State v. Sheppard, supra;* note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 Harv. L. Rev. 806, 823 (1985) (videotaping statutes "provide 'all that the Sixth Amendment demands' "); *but see Powell v. State*, 694 S.W.2d 461 (Tex. App. 1985) (confrontation rights violated where defendant not afforded opportunity to consult with counsel during cross-examination). It is too late in the day to question the state's compelling interest in the welfare of children. This Court has repeatedly recognized the "compelling" interest the States have in "safeguarding the physical and psychological well being of a minor." *New York v. Ferber*, 458 U.S. 747, 756-57 (1982); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982); *see Ginsberg v. New York*, 390 U.S. 629, 640 (1968) (recognizing "society's transcendent interest in protecting the welfare of children").

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[11] Amici do not contend that the intimidation of a child victim of sexual assault during the commission of the offense is in itself sufficient to justify an alternate means for presenting the child's testimony at trial.

That interest is particularly strong here, where two children not only have been subjected to the degradation of sexual abuse, but where they are likely to suffer severe emotional trauma and injury at the hands of the judicial process at a public trial.

To be sure, the states also have a compelling interest in the fairness of criminal trials, especially upon such serious charges. But the inquiry, as we have shown, requires an examination of the extent to which confrontation rights, designed to ensure the fairness of the trial, would be affected by the alternative procedures requested by the state in this and similar cases. The core object of confrontation, the opportunity of cross examination; *Kentucky v. Stincer,* 482 U.S. ____, 107 S. Ct. 2659, 2664 (1987); *Delaware v. Van Arsdall,* 106 S. Ct. 1431 at 1435 (1986); is left wholly intact. So too is the jury's opportunity to observe the demeanor of the witness under questioning; *Ohio v. Roberts,* 448 U.S. at 63-64; and the child's obligation to testify under oath. *California v. Green,* 399 U.S. 149, 158 (1970).

The witnesses testified before the jury and were aware of the defendant's presence. They did not see him. But the defendant has not shown that their testimony was thereby diminished in reliability, and there is reason to believe just the opposite is true.

Finally, the defendant's own intimidating conduct contributed greatly to the victims' anxieties, which necessitated the procedure used. Conduct so destructive of the truth-determining process has never been ignored by our courts.

The balance clearly favors society's compelling interest in the welfare of children over the slight restriction of confrontation ordinarily accorded.

CONCLUSION

This Nation is in the midst of a crisis of vast proportions. At stake is the well being of its most vulnerable citizens, its children. A government that ignores the tragic consequences of child sexual abuse does not deserve the public trust. Legislatures throughout the Country have acted to protect child victims of sexual crimes by avoiding the harmful effects of the face-to-face encounter between the child and the alleged abuser. They have protected the accused's confrontation rights by leaving him free to cross-examine the witness. The Constitution requires no more, and the responsibility of democratic government requires no less.

The judgment below should be affirmed.

Respectfully submitted.

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AMICUS CURIAE

BRIEF

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NO. 86-6757

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

JOHN AVERY COY

Appellant

versus

THE STATE OF IOWA

Appellee

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF IOWA

BRIEF FOR AMICI CURIAE IN SUPPORT OF IOWA BY THE ATTORNEY GENERAL OF KENTUCKY AND THE THIRTY-FIVE STATES THAT APPEAR ON THE INSIDE COVER

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INTERESTS OF AMICI CURIAE

The state of Kentucky and the sister States joining this brief are vitally interested in the issues posed by efforts to provide procedural protection for child victims in sexual abuse prosecutions. Kentucky and other States have become increasingly concerned with the psychological trauma visited upon child victims of sexual abuse when those children are subsequently put through the ordeal of giving testimony in a criminal case. The States have a compelling interest in providing the maximum psychological shelter possible for the child victim consistent with the Constitution. The issues posed by the Iowa screening procedure will substantially affect those vital state interests.

It is urged that the limited screening of the defendant from the child, but not the child from the defendant, is a narrowly tailored procedure well-calculated to minimize damage to the child

while preserving all of the constitutional rights of the defendant.

For these reasons, the state of Kentucky and sister States urge this Court to affirm the opinion of the Supreme Court of Iowa in State v. Coy, 397 N.W.2d 730 (Iowa 1986). The amici submit this brief in support of Iowa through their Attorneys General pursuant to United States Supreme Court Rule 36.4.

SUMMARY OF ARGUMENT

Confrontation is not for the idle purpose of gazing upon a witness or being gazed upon. There is no violation of confrontation where the witness is available at trial, gives his statements under oath, is forced to submit to cross-examination and the jury is able to observe the witness' demeanor to aid in assessing his credibility.

Coy claims that confrontation was violated because the victims could not see him. Lower courts have overwhelmingly rejected claims that

face-to-face confrontation requires eyeball-to-eyeball contact in prosecutions for sexually abusing a child. The use of modern technology such as one-way screens, videotapes, and closed-circuit television provides protection for victims without infringing the right of confrontation. Reducing the trauma inherent in testimony by child victims furthers the mission of confrontation of advancing the truth-seeking function of trial.

The requirements of confrontation were fully satisfied in the present case since the witnesses testified under oath in the presence of the jury and were subject to unrestricted cross-examination.

Furthermore, screening devices such as one-way mirrors, videotapes or closed-circuit television are not so inherently prejudicial as to deny due process. Nor has Coy shown actual prejudice where the jury was admonished that such devices were standard in child abuse cases, and where Coy had concealed his identity from the

victims but the circumstantial evidence against him was very strong.

Even if this Court should find that any constitutional right was implicated by the narrow Iowa procedure, the state's interest as parens patriae in child sexual abuse cases is a compelling one widely recognized by numerous authorities and state legislatures. Case law and legislative policy establish that child sexual abuse victims must be accorded special treatment in the criminal justice system; no other presumption is warranted. The balance of interests strongly favors the special needs of child victims.

ARGUMENT

I.

THE CONFRONTATION CLAUSE IS NOT VIOLATED BY STATE PROCEDURES WHICH PROVIDE PROTECTION FOR CHILD SEXUAL ABUSE VICTIMS BUT ALLOW THE JURY TO OBSERVE THE DEMEANOR OF THE WITNESS, THE DEFENDANT TO SEE AND HEAR THE WITNESS, AND PLACE NO LIMITS ON THE OPPORTUNITY TO CROSS-EXAMINE.

A. Confrontation Guarantees An Opportunity For Cross-Examination, Not Eyeball-To-Eyeball Contact.

Just last term this Court reiterated and emphasized the functional purpose provided by the Confrontation Clause of "ensuring a defendant an opportunity for cross-examination" and promoting the reliability of the truth-finding function of a criminal trial. Kentucky v. Stincer, 480 U.S. ___, 107 S.Ct. 2658, 2664 (1987).

> The Court has emphasized that "a primary interest secured by [the Confrontation Clause] is the right of cross-examination." Douglas v. Alabama, 380 U.S. 415, 418 (1965). The opportunity for cross-examination, protected by the Confrontation Clause, is critical for ensuring the integrity of the fact-finding process. Cross-examination is "the principal means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 316 (1974). Indeed, the Court has recognized that cross-examination is the "'greatest legal engine ever invented for the discovery of truth.'" California v. Green, 399 U.S. 149, 158 (1970), quoting 5 J. Wigmore on Evidence § 1367, p. 29 (3d ed. 1940). The usefulness of cross-examination was emphasized by this Court in an early case explicating the Confrontation Clause:
>
> > The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits . . . being used

> against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." Mattox v. United States, 156 U.S. 237, 242-243 (1895).

See also Kirby v. United States, 174 U.S. 47, 53 (1899).

Id., 107 S.Ct. at 2662.

In Davis v. Alaska, 415 U.S. 308, 315-316 (1974), this Court quoted pertinent language from 5 Wigmore, Evidence, Sec. 1395, p. 123 (3rd ed. 1940), emphasizing that the

> main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination.

See also: 5 Wigmore, Evidence, Sec. 1395, p. 150 (Chadbourn rev. 1974) quoted in Kentucky v. Stincer, 107 S.Ct. at 2662, n. 8.

California v. Green, 399 U.S. 149, 158 (1970), held there was no violation of confrontation where the witness was available at trial for cross-examination on his prior out-of-court statement, since confrontation:

> (1) insures that the witness will give his statements under oath -- thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth;" (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

Each of these requirements was satisfied in the present case, as discussed infra page 12.

B. Lower Courts Have Overwhelmingly Rejected The Claim That A Child Sexual Abuse Victim Must Be Able To See The Accused To Satisfy Confrontation.

Despite these clear precedents, appellant urges this Court to extend the Confrontation Clause to hold that his rights were violated because the child sexual abuse victims in this case could not

see him.[1] Appellant quotes repeatedly from this Court's decisions that the jury should be able to assess the witness' credibility by observing demeanor; then, without even pausing, extends that language to confer the same right to a defendant. Finally, relying on the preference for face-to-face confrontation as opposed to ex parte affidavits or depositions, he asserts that the Constitution requires that the child victim must be able to see him.

Lower courts faced with the same issue have overwhelmingly rejected appellant's position and

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[1]This claim takes on a hollow ring when appellant claims that the alternatives available to the trial court, such as deposition, videotape or a child courtroom where appellant could have been shielded from the witnesses, would have been "less prejudicial alternatives." Appellant's Brief, pp. 33-34.

almost uniformly found no violation of the right of confrontation.[2]

In Commonwealth v. Willis, 716 S.W.2d 224 (Ky. 1986), the Kentucky Supreme Court upheld a video-taping statute, where the sexually abused child cannot see or hear the defendant, against challenges under both the state constitutional guarantee of a

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[2]See: State v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1330 (1984); Commonwealth v. Willis, 716 S.W.2d 224 (Ky. 1986); People v. Johnson, 146 Ill.App.3d 640, 497 N.E.2d 308 (1986); State v. Cooper, 291 S.C. 351, 353 S.E.2d 451 (1987); Commonwealth v. Ludwig, No. E1003, ___ A.2d ___ (Pa.Sup., en banc decided September 8, 1987), pet. for allowance of appeal pending; State v. Daniels, 484 So.2d 941 (La.Ct.App. 1986); In re Appeal in Pinal County Juvenile Action Nos. J-1123 & J-1124, 147 Ariz. 302, 709 P.2d 1361 (Ariz.App. 1985); Chambers v. State, 504 So.2d 476 (Fla.Ct.App. 1987); State v. Johnson, 240 Kan. 326, 729 P.2d 1169 (1986); State v. Warford, 223 Neb. 368, 389 N.W.2d 575 (1986); State v. Tafoya, 105 N.M. 117, 729 P.2d 1371 (Ct.App. 1986), cert. denied 105 N.M. 94, 728 P.2d 845 (1986), pet. for cert. filed, 55 U.S.L.W. 3608 (Feb. 2, 1987) (No. 86-1343); State v. Vigil, 103 N.M. 583, 711 P.2d 28 (Ct.App. 1985); People v. Henderson, 132 Misc.2d 51, 503 N.Y.S.2d 238 (1986); People v. Algarin, 129 Misc.2d 1016, 498 N.Y.S.2d 977 (1986). See also: ABA Guidelines for the Fair Treatment of Child Witnesses in Cases Where Child Abuse is Alleged, Guideline No. 3(g) (1985).

right to meet witnesses "face to face" and the federal constitutional right "to be confronted with the witnesses against him."

> There is no constitutional right to eyeball to eyeball confrontation. The choice of the words "face to face" may have resulted from an inability to foresee technological developments permitting cross-examination and confrontation without physical presence.
>
> In the Eighteenth and Nineteenth Centuries, live testimony was the only way that a jury could observe the demeanor of a witness. The use of video tapes does not represent a significant departure from that tradition because the goal of providing a view of the witness's demeanor to the jury is still achieved.
>
> The intervention of a video screen or a one-way mirror does not infringe upon the defendant's right to confrontation. There is a difference between confrontation and intimidation. It would be unconstitutional for the government to take evidence in secret and outside of the presence of the defendant, but there is no right to eyeball to eyeball presence.

Id. at 230-231 (emphasis added). Pennsylvania likewise rejected similar state and federal confrontation clause attacks when, without statutory authorization, a trial court permitted a six-year-old victim to testify by closed-circuit

television from another room. Commonwealth v. Ludwig, No. E1003, ___ A.2d ___ (Pa.Sup., en banc decided September 8, 1987), pet. for allowance of appeal pending. The Pennsylvania court stated:

> The court did nothing more than adopt modern technological means to allow the jury to hear testimony which otherwise would have been unavailable. The use thereof did not violate the defendant's right to confront the witnesses against him. It served only to enhance the fact-finding process.

Slip Opinion, p. 16.

With child victims, reducing the trauma of courtroom testimony often enhances the reliability of the evidence. The stress of facing the accused tends to decrease rather than increase probity. Mahady-Smith, The Young Victim as Witness for the Prosecution: Another Form of Abuse?, 89 Dick. L. Rev. 721, 724, n. 21 (1985). Thus, the Iowa procedure enhances the very mission of confrontation--ensuring the accuracy of the evidence at trial. Tennessee v. Street, 471 U.S. 409, 415 (1985); United States v. Inadi, 475 U.S. ___, 106 S.Ct. 1121, 1127 (1986).

C. The Requirements Of Confrontation Were Satisfied Here.

The one-way screening procedure authorized by the Iowa legislature and applied here fully satisfied appellant's right of confrontation. The victims testified under oath. They were forced to submit to cross-examination. Appellant's opportunity to cross-examine was not restricted by the trial court. The jury could observe the demeanor of the witnesses, thus aiding in assessing their credibility. Confrontation requires no more. See California v. Green, 399 U.S. 149, 158 (1970). Though not required by confrontation, appellant could also see and hear the witnesses and they were aware of his presence. The decision of the Iowa Supreme Court that Coy's right of confrontation was not infringed should be affirmed.

II.

THE IOWA SCREENING PROCEDURE DID NOT DENY COY DUE PROCESS OF LAW.

A. A Due Process Violation Requires That The Procedure Be Inherently Prejudicial Or That Prejudice Be Shown.

Although an accused has a fair trial right, based upon the Sixth and Fourteenth Amendments, to be judged solely upon the basis of the evidence introduced at trial, this Court also has made it clear that this

> does not mean . . . that every practice tending to single out the accused from everyone else in the courtroom must be struck down. Recognizing that jurors are quite aware that the defendant appearing before them did not arrive there by choice or happenstance, we have never tried, and could never hope, to eliminate from trial procedures every reminder that the State has chosen to marshall its resources against a defendant to punish him for allegedly criminal conduct.

Holbrook v. Flynn, 475 U.S. ____, 106 S.Ct. 1340, 1345 (1986). Recognizing this, the Court has taken a strict approach to the constitutional analysis of these issues. Before a procedure will be struck down it must be "inherently prejudicial." Holbrook, supra at 106 S.Ct. 535. The courtroom practice in question must be of such a nature as to undermine

the basic "fairness of the fact-finding process." Estelle v. Williams, 425 U.S. 501, 503 (1976).

Appellant's reliance upon Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982), to justify a showing of "necessity" under the facts of this case is entirely misplaced. Globe involved the First Amendment, more jealously guarded by the courts than any other, and the exclusion was total. In the instant case there is no requirement for a showing of necessity because the intrusion, if any, was narrowly tailored to meet a specific broad-based need.

B. The Iowa Screening Procedure Is Not Inherently Prejudicial Under Due Process Analysis, Nor Has Coy Shown Actual Prejudice.

When the screen was first employed, the Iowa trial court carefully admonished the jury. This admonition bears directly upon the determination of whether the use of the screening procedure was "inherently prejudicial." Four observations may be made.

First, the trial court informed the jury that the use of the screen was the result of a law, recently passed by the Iowa General Assembly, which "provides for this sort of a procedure in cases involving children" (J.A. 17). They were admonished that its use was not evidence of guilt and was not to be inferentially considered by them in any fashion (Id.). The jury was left with the specific acknowledgement of the court that the screen was "standard operating procedure" in cases involving children. The use of the screen was no more prejudicial than having the accused at counsel table, or indeed, having him stand trial at all.

Second, the force of the trial court's admonition is strengthened by the fact that the assailant was masked and the victims did not identify him at trial (J.A. 20, 32, 37-38). Although appellant argues that the screen led the jury to infer that it was necessary to reduce the trauma to the children of testifying in front

of the guilty defendant, just the opposite is the case. So long as the screen is seen by the jury as "just something that is done" in cases involving children, there is no prejudice to the defendant. However, for the two young child victims, the possibility that the person who threatened and terrorized them was present in the courtroom was traumatic. The trauma would increase, if appellant has his way, by forcing them to associate the accused's face with their ordeal.

Third, the evidence against Coy was substantial. Items taken from the child victims were found scattered throughout Coy's home next door (J.A. 59; TR 199). His fingerprints were found on one of these (J.A. 48). Pubic and head hairs similar to Coy's were found in the bedding and the girls' shorts (J.A. 50). He wore his wristwatch in the same peculiar fashion - far up his arm, almost to the elbow, with the face inside - as the assailant (J.A. 58). To argue that Coy was convicted because of prejudice

caused by the screening procedure, as appellant does, is to ignore the very compelling evidence presented by the prosecution.

Fourth, the Iowa statute does not specify the nature or size of the screening device; Coy's attack on the statute is overly broad. Appellant does not even argue that all or even most of the screening devices which could be utilized are inherently prejudicial.[3] Wildermuth v. State, 530 A.2d 275, 292 (Md. 1987), rejected a similar claim concerning closed-circuit television. Coy also has the burden of proving specific prejudice in his own trial. This he has failed to do.

Finally, as will be discussed in Argument III of this brief, there is an essential state interest in providing this protection to crime's youngest, most innocent, victims. Estelle v. Williams, 425 U.S. at 505.

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[3]For example, a standard movable blackboard, already found in many courtrooms, could unobtrusively screen the victim from the accused.

III.

THE NEED TO PROVIDE SPECIAL PROTECTION FOR CHILD VICTIMS IS AMPLY DEMONSTRATED AND ESTABLISHES A COMPELLING STATE INTEREST.

A. The State Has A Powerful Interest In Minimizing Psychological Trauma To Child Sexual Abuse Victims.

Should this Court decide that the Confrontation Clause or due process is implicated by the Iowa screening procedure, it must then consider the balance between the interests of the defendant and the interests of the state in the prosecution of child sexual abuse. Conflicts among these interests come into sharpest focus in child sexual abuse cases. The only eyewitness to the crime is often a child of tender years who has been betrayed by a powerful, trusted adult. The National Center on Child Abuse and Neglect reported in 1981 that the average age of a victim of child sexual abuse was between 11 and 14, but more recent data from one program showed that

one-third of the victims were under age six.[4] Asking such a witness to understand, not to be afraid, and to respond in a court of law as a mature adult is asking too much in most cases. For this reason, many charges will never be prosecuted.[5]

Coy tries to denigrate the widely recognized need in the criminal justice system to accord fair treatment and "justice" to victims as well as defendants. In Snyder v. Massachusetts, 291 U.S. 97, 122 (1934), Justice Cardozo cautioned:

> But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.

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[4]Bulkley, Evidentiary And Procedural Trends In State Legislation And Other Emerging Legal Issues In Child Sexual Abuse Cases, 89 Dick.L.Rev. 645, 647 (1985); Ordway, Parent-Child Incest: Proof At Trial Without In-Court Testimony By The Victim, 15 Univ. of Mich. J. Law Reform, 131, 133, note 8 (1981).

[5]See, for example, State v. Sheppard, 484 A. 2d 1330, 1333 (N.J. Super. 1984).

In 1982, the Chairman of the President's Task Force on Victims of Crime described the neglect of crime victims as a "national disgrace."[6] The need for reform in the handling of child victims has been recognized by the American Bar Association,[7] the National Conference of the Judiciary on the Rights of Victims of Crime,[8] the more than 2000 members of the National Council

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[6]President's Task Force on Victims of Crime, Final Report (Washington, D.C..: December 1982) at vii (statement of Lois Haight Herrington). "Somewhere along the way, the system began to serve lawyers and judges and defendants, treating the victim with institutionalized disinterest" (Id. at vi). See also: Carrington and Nicholson, The Victims' Movement: An Idea Whose Time Has Come, 11 Pepperdine Law Review, Symposium (1984).

[7]American Bar Association, Guidelines for the Fair Treatment of Child Witnesses in Cases Where Child Abuse Is Alleged (Washington, D.C.: 1985).

[8]Statement of Recommended Judicial Practices, The National Institute of Justice (Washington, D.C.: 1983).

of Juvenile and Family Court Judges,[9] and the United States Attorney General's Advisory Board.[10] The need for special treatment of child sex abuse victims is highlighted by studies concluding that 10 percent of males and 25 percent of females have been sexually abused as children and that only about six percent of the perpetrators are strangers.[11] The President's Task Force subsequently recommended: "Judges should recognize the profound impact that sexual molestation of children has on victims and their families . . . ."[12] The Victims Assistance

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[9]National Council of Juvenile and Family Court Judges, Metropolitan Court Judges' Committee, Deprived Children: A Judicial Response, 73 Recommendations (Reno, Nevada: August 1986).

[10]America's Missing and Exploited Children: Their Safety and Their Future, Report and Recommendations to the President and Congress, U.S. Department of Justice (Washington, D. C.: March, 1986).

[11]Deprived Children, supra n. 9, at 10.

[12]Four Years Later, A Report on the President's Task Force on Victims of Crime, U.S. Department of Justice, at 31 (Washington, D.C.: May, 1986).

Project Committee of the National Council of Juvenile and Family Court Judges strongly recommends the use of videotaping, closed-circuit television and other screening techniques to lessen the trauma of testifying for the child sexual abuse victim and to enhance the reliability of the testimony.[13]

Finally, among child sex victims, "the most frequently mentioned fear was facing the defendant."[14] "Whether the courtroom experience is traumatic or therapeutic depends in large measure on the attitude of the court itself toward modifying the proceedings as necessary to accommodate the needs of child victims and witnesses."[15]

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[13]National Council of Juvenile and Family Court Judges, Victims Assistance Project Committee, Child Sexual Abuse: Improving the System's Response, 37 Juv. & Fam. Ct. J. 1, 30-33 (No. 2 1986).

[14]When the Victim Is a Child, U.S. Department of Justice, at 17, 49 (Washington, D.C.: August 1985).

[15]American Bar Association Guidelines, supra n. 7, at 19.

The risk of trauma in all cases is substantial.[16]

Amici submit that Coy's assertion that the state must show necessity for the screening procedure is based upon an unwarranted and unfounded assumption. That assumption is that there is no trauma to the child. This assumption is fundamental to any requirement that the state must prove necessity on a case-by-case basis. The Iowa procedure, on the other hand, recognizes that trauma is the norm in this narrow class of cases. Why, for purposes of cross-examination, should a child victim be required to prove that

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[16]"For a small girl to have to talk about an intimate experience is painful. To have to talk about it to strangers in a strange setting is painful. To be cross-examined by lawyers trying to discredit her, however gently, is painful. To repeat it in a large courtroom with twelve jurors staring at her, and an armed and uniformed bailiff and a judge sitting above her all in black is painful. Each of the pains may be as traumatic as the incident itself, often more so. The pains can be reduced." Child Sexual Abuse, supra, n. 13 at 30.

facing a sexual molester again will be frightening or to detail just how terrifying the experience will be? Common sense and experience tell us it would be traumatic. Why should a child victim be forced to face an alleged molester yet another time? Appellant has not demonstrated any need to place such a burden on the innocent victim, the child.

B. The Strength Of The State Interest Is Evidenced By A Nationwide Legislative Trend Toward Reforming Procedures In Child Abuse Cases.

The growing awareness of the problem of child sexual abuse, and the corresponding increase in sensitivity to the trauma that the criminal justice system itself may induce, has resulted in extensive state legislation aimed at reducing psychological damage to child sexual abuse victims. At least twenty-one states have recently adopted laws authorizing testimony by one-way videotape or closed circuit television.[17] By any measure,

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[17]See: American Bar Association Amicus Brief, Appendix.

the intensity of the state response to this issue is impressive testimony to the strength of the social interests at stake. The states have a powerfully compelling interest in providing the child witness with the maximum psychological shelter consistent with the Constitution. States have relaxed competency criteria for children, created special hearsay exceptions, limited access to spectators, authorized the introduction of videotaped testimony, permitted the taking of testimony via closed-circuit television, and allowed introduction of videotaped first statements concerning the alleged child abuse by a non-attorney interviewer. See: Eatman & Bulkley, Protecting Child Victim/Witnesses, Sample Laws and Materials (2d ed. 1987); Bulkley, Evidentiary and Procedural Trends in State Legislation and Other Emerging Legal Issues in Child Sexual Abuse Cases, 89 Dick. L. Rev. 645 (1985); Whitcomb, Assisting Child Victims in the Courts: The Practical Side of Legislative Reform in ABA Papers

from a National Policy Conference on Legal Reforms in Child Sexual Abuse Cases, 15-23 (1985).

States previously recognized their obligation to protect children through blanket legislation such as child labor laws and juvenile justice systems. Now they are realizing the need to protect child victims.[18] One judge referred to the state's obligation as parens patriae to protect children laboring under the disability of their age in the courtroom.[19]

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[18]See, e.g.: Commonwealth v. Ludwig, supra, Tamilia, J., concurring.

[19]Id., Montemuro, J., concurring: "Where children are involved, as victims of (sexual) abuse, the interest adverse to that of the accused is the state's obligation as parens patriae, the ultimate parent, to protect its charges, simply because, by virtue of their age, they labor under a disability. They are . . . qualitatively different from adults, particularly when they have been victimized. To ignore the difference is to disregard the protective responsibility, although it is in fact the motivating factor in the recent criminalization of child abuse in Pennsylvania's legislation [footnote omitted]. Its importance here is in the recognition that the inherent weakness of children, which allows the sort of exploitation being prosecuted, leaves the victim open to further persecution if the state's obligation to prevent additional harm is not fulfilled." Slip Opinion, pp. 1-2.

The Iowa screening procedure is quite modest; the full-dress cross-examination and confrontation rights of the trial itself were in no way modified. If this Court were, at this early juncture, to strike down this minimal, narrowly tailored protection of the child, it would substantially cripple the emerging nationwide effort to evolve an accommodation between the rights of the accused and the psychological health of the child victim.

This Court has already held that the state "interest . . . in safeguarding the physical and psychological well-being of a minor . . . is a compelling one." Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982). Only last term this Court reiterated that legislatures are better qualified to weigh and evaluate that data which, in this case, may point clearly to increased trauma for the child victim if that child is treated as merely another witness. McClesky v. Kemp, 481 U.S. ___, 107 S.Ct. 1756, 1781 (1987). This Court should continue the traditional deference

it has paid to the enactments of state legislatures in our system of criminal justice and uphold the constitutionality of the Iowa screening procedure.

CONCLUSION

For the foregoing reasons, the decision of the Iowa Supreme Court should be affirmed.

Respectfully submitted,

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BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOHN AVERY COY,

Appellant,

v.

STATE OF IOWA,

Appellee.

On Appeal from the Supreme Court of Iowa

BRIEF OF AMICUS CURIAE THE AMERICAN BAR ASSOCIATION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-6757

JOHN AVERY COY,

Appellant,

v.

STATE OF IOWA,

Appellee.

On Appeal from the Supreme Court of Iowa

BRIEF OF AMICUS CURIAE THE AMERICAN BAR ASSOCIATION

INTEREST OF THE AMICUS CURIAE

The American Bar Association [hereinafter "ABA"] is a voluntary, national membership organization of the legal profession. Its more than 335,000 members come from every state and territory and the District of Columbia. The constituency of the ABA includes prosecutors, public defenders, trial and appellate judges at the state and federal levels, legislators, law enforcement and corrections professionals, law school deans, law professors, and a number of non-lawyer Associates in allied fields. Since its inception over one hundred years ago, the ABA has taken an active interest in the improvement of the administration of justice and the judicial process, and in recent years it has given special attention to the handling of child abuse cases by the courts.

The Association, with the written consent of the parties,[1] submits this brief as *amicus curiae* to call this Court's attention to its policies and scholarly work related to the issues presented in this case.

BACKGROUND

On July 10, 1985, the ABA House of Delegates adopted the *Guidelines for the Fair Treatment of Child Witnesses in Cases Where Child Abuse is Alleged* [hereinafter "*Child Witness Guidelines*"]. Section 3 contains a set of recommendations related to court procedures and practices which may be modified "to accommodate the needs of child witnesses. . . ." Subsection (g) directly relates to the issue before this Court. It states that:

> When necessary, the child should be permitted to testify via closed-circuit television or through a one-way mirror or any other manner, so long as the defendant's right to confrontation is not impaired.

The *Child Witness Guidelines* were the result of a year-long collective endeavor by the ABA Criminal Justice Section's Prosecution and Defense Function Committees, beginning in 1984. Extensive input on the guidelines was received by the Section's professionally diverse governing council, comprised of professors, defense lawyers, prosecutors, judges, and others. In the introduction to the guidelines, former ABA President John C. Shepherd wrote that one of the most important tasks for attorneys is the assurance "that our children receive the rights and protection they deserve." *Id.* at 6.

The background materials accompanying the *Child Witness Guidelines*[2] indicate that children are appearing

[1] Copies of the letters indicating the parties' consent have been filed with the Clerk of the Court.

[2] The Foreword and Commentary to the *Child Witness Guidelines* cited herein are not Association policy, but are discussed in order to help describe and interpret the guidelines' intent.

in court with increasing frequency as victims and witnesses, and that they have "special problems and needs." *Id.* at 4. Describing the adult criminal justice system as "frequently alien and discomforting" to children, the introduction to the guidelines recognizes that this system exacerbates existing problems of abused children "by creating additional stresses." *Id.* at 6-7. However, the introduction also notes that "not every recommendation . . . is appropriate for every case," and thus suggests that the reforms specified therein be used judiciously. *Id.* at 11.

In the commentary to the guideline section most directly relevant to this case, the author recognizes that a prosecutor might be protecting a child abuse victim's emotional interest by not calling the child to testify. This would spare the child from having "to face the alleged abuser and accuse him or her of criminal acts." *Id.* at 18. The commentary goes on to state that although not all in-court testimony may be traumatic to a child, this depends "in large measure on the attitude of the court itself toward modifying the proceedings as necessary to accommodate the needs of child victims and witnesses" (*id.* at 19), and that "judges and attorneys should do all in their power to lessen the trauma." *Id.* at 22.

Noting that it "is frequently difficult for a child victim or witness to face the defendant . . . during testimony" (*id.* at 24), the commentary urges that, in "appropriate cases," children be permitted to testify through alternative means, and that such "contemporaneous examination" does not deprive a defendant of his constitutional rights. *Id.* at 25. After describing procedures used in a number of states which provide for the use of closed-circuit television transmission of the child's testimony, the commentary notes that "less costly and electronically sophisticated is the use of one-way mirrors to shield the child victim's view of the defendant while he or she is testifying." *Id.*

In summarizing the justification for this process, the commentary states that "[t]he use of alternative means of presenting a child's testimony to the court . . . through a one-way mirror . . . represents a responsible and compassionate approach to the dilemma of securing the child's testimony with a minimum of contact with the defendant and spectators while at the same time preserving a defendant's confrontational right" (*id.* at 30), and that "alternative methods of presenting the testimony of a child victim or witness should be an available option to be utilized when necessitated by the circumstances in the particular case. . . ." *Id.* at 37-38 n.69.

The Association's interest in improving the legal and judicial systems' handling of child abuse cases predates the 1985 *Child Witness Guidelines.* Since 1978, the ABA Young Lawyer's Division has sponsored the National Legal Resource Center for Child Advocacy and Protection. The procedures under consideration in this case have long been a topic of Resource Center study. One of its first major works, *Child Sexual Abuse and the Law* (J. Bulkley ed. 1981), contained a state-by-state breakdown of relevant laws and an analysis of pertinent evidentiary issues. This was followed by *Innovations in the Prosecution of Child Sexual Abuse Cases* (J. Bulkley ed. 1981), which provided a survey of innovative prosecutorial practices and descriptions of programs which utilized new approaches to the handling of these matters. In 1982, the ABA Resource Center issued *Recommendations for Improving Legal Intervention in Intrafamily Child Sexual Abuse Cases,* which, among other suggestions, urged that procedures be modified to reduce trauma to the child caused by legal and investigatory procedures and to ease evidentiary barriers to facilitate the fact-finding process. One recommendation suggested that, where necessary to prevent emotional trauma to the child, procedures be developed, subject to applicable constitutional restraints, to avoid the need for taking the child's testimony in open court at trial. *Id.* at 1.

In 1985, the ABA Resource Center convened a national conference on legal reforms in child sexual abuse cases. Several of the participants discussed the constitutional issues relating to the use of alternatives to taking a child's testimony in open court, as well as the special vulnerabilities of young sexual molestation victims. A series of papers reflecting diverse views on these issues was published by the ABA as *Papers from a National Policy Conference on Legal Reforms in Child Sexual Abuse Cases* (many of the articles therein were republished in a *Symposium on Child Sexual Abuse Prosecutions,* 40 U. Miami L. Rev. 1-284 (1985)).

Finally, in February 1986, the ABA Resource Center published R. Eatman & J. Bulkley, *Protecting Child Victim/Witnesses—Sample Laws and Materials* (2nd ed. 1987). This work was intended to aid states wishing to pursue the suggestions contained in the *Child Witness Guidelines*

INTRODUCTION AND SUMMARY OF ARGUMENT

The ABA *Child Witness Guidelines* do not specifically address the constitutional issues presented in this case. This brief, therefore, supports neither party. Nonetheless, it is being submitted due to the potential impact of this case on the use of a variety of alternative testimonial procedures[3] involving young victims of abuse which have been the focus of significant Association attention.

Child victims are usually the key witnesses in child abuse prosecutions; their testimony is likely to be indispensible to the conviction of the person who committed the crime. Yet, the very act of testifying is an abusive

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[3] "Alternative testimonial procedures," as used in this brief, include the use of one or two-way closed-circuit television and one-way screens, mirrors or other barriers. See Appendix for description and listing of relevant state statutes.

experience for many children. Young children, when called to testify, "may be subjected to an excruciating experience during efforts to elicit the sordid facts of the crime. Emphasis on the minutest details of the offense serve to magnify the act out of proportion and add to the child's sense of guilt and shame." V. DeFrancis, *Protecting the Child Victim of Sex Crimes* 3 (1969).

In light of this, state legislatures in the majority of states have, in recent years, enacted statutes designed to minimize the danger of undue emotional trauma to child witnesses. Some of these statutes allow for the live testimony of the child victim, but in a manner intended to reduce the risk of trauma. These include the one-way or two-way closed-circuit telecasting of the child's live testimony into the courtroom from another location. Such statutes permit a departure from normal trial practice. Yet the departure is slight, at most restricting face-to-face confrontation. All other procedural and confrontational safeguards, from cross-examination to the jury's unobstructed view of the witness, remain unimpaired.

In this case, the testimony of children who had been sexually abused was taken in the courtroom, with the appellant placed behind a one-way screen. He could see the witnesses, but they could not see him. The ABA submits that, in certain circumstances, a child witness should be permitted to testify without having to view the defendant. In this context, the use of a screen is a minimal intrusion on the defendant's interest in confrontation which is warranted in view of society's countervailing interest in protecting child witnesses from additional emotional trauma.

The ABA also urges that trial judges consider various factors in determining whether circumstances call for a one-way screen or other alternative testimonial procedure. These factors include, for example: age of the child, nature of the offense, relationship of the child to the defendant, and whether the defendant had previously

threatened the child. However, in keeping with the important interest of protecting the child witness, the means of presenting these factors to the court should not, themselves, subject the child to harm. Thus, for example, the child should neither be subjected to lengthy *voir dire* or psychological evaluations, nor should the proceedings be delayed after the child has been called to testify. The judge may rely upon information of lay persons which provide credible evidence that a child may suffer harm if required to testify with a full view of the defendant.

ARGUMENT

I. THE USE OF A ONE-WAY SCREEN OR OTHER ALTERNATIVE TESTIMONIAL PROCEDURE IS AN APPROPRIATE MEANS OF FACILITATING THE FACT-FINDING PROCESS AND REDUCING THE EMOTIONAL TRAUMA THAT CHILDREN MAY EXPERIENCE BY HAVING TO TESTIFY ABOUT PHYSICAL AND SEXUAL OFFENSES COMMITTED AGAINST THEM.

Many state legislatures have enacted laws to implement procedures to minimize the emotional trauma that child victims of sexual abuse or violent crime may experience when testifying in court. These laws seek to protect the child by reducing or eliminating his or her direct visual contact with the defendant, judge, jury, or public. They allow the child to testify behind one-way screens or mirrors, or on one-way or two-way closed-circuit television. Other statutes permit the admission, at trial, of a videotape of the child's prior testimony or deposition. As current expressions of public opinion, these statutes offer relevant guidance on the constitutional issues presented in this case. *Rivera v. Minnich*, 483 U.S. ——, 107 S. Ct. 3001, 3003 (1987).

These laws have been enacted in response to disquieting changes in our society. From 1976 to 1985, annual reports of child maltreatment made to designated public

agencies increased dramatically, leaping nearly threefold from 669,000 reports to over 1.9 million. American Association for Protecting Children, *Highlights of Official Child Neglect and Abuse Reporting 1985*, 3 (1987). Reports of child sexual abuse have risen at an even more alarming rate. By 1985, 12 percent of all reported child maltreatment involved sexual abuse allegations. *Id.* at 16. In light of these statistics, the 1980s have witnessed growing public and professional support for enabling the criminal justice system to respond to physical and sexual child abuse. The Attorney General's Task Force on Family Violence, for example, urged the criminal justice system to treat violence between family members as it does violence between strangers. *Final Report* 4 (1984). Many others have called for the treatment of *all* child molestation as a "serious criminal offense." U.S. Department of Justice, *Protecting Our Children: The Fight Against Molestation* 4 (1984) (comments of Assistant Attorney General Lois Haight Herrington at National Symposium on Child Molestation). *See, also*, Berliner & Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 J. Soc. Issues 125 (No. 2 1984).

As more child abuse related cases enter the criminal justice system, it has become clear that their prosecution raises serious problems. The first problem concerns the emotional trauma frequently suffered by child witnesses because of insensitive investigative procedures and the experience of testifying in court. The trauma is particularly acute when children are required to testify about a physical or sexual assault committed upon them by a family member or close acquaintance. *Id.* at 128. As one leading child sexual abuse expert noted: "testifying at an open trial is a stressful experience for even the most secure adult, and is often the most difficult encounter of all for the child victim of sexual assault. The child may have to sit alone on the witness stand answering a series of complex questions and pointing to the accused in a courtroom full of spectators." MacFarlane, "Sexual Abuse

of Children," in *Victimization of Women* 81 (J. Chapman & M. Gates eds. 1978). One researcher, in visiting four sites to discover what troubled child witnesses about the criminal justice system, found that prosecutors, judges, social workers and others reported that:

> The most frequently mentioned fear was facing the defendant. That experience is frightening . . . to a child who does not understand the reason for confrontation. [T]he participation and experience of being in close proximity to the defendant can be overwhelming.

D. Whitcomb, E. Shapiro, & L. Stellwagen, *When the Victim is a Child: Issues for Judges and Prosecutors* 17-18 (1985).

Researchers have also begun to study this issue by talking to abused children who have testified in court. Some preliminary findings confirm "that courtroom testimony is associated with increased behavioral disturbance in children." Goodman, Jones, Pyle *et al.*, "The Emotional Effects of Criminal Court Testimony on Child Sexual Assault Victims," in *Proceedings from the International Conference on Child Witnesses: Do the Courts Abuse Children?* (British Psychological Association, in press). *See, also, State v. Sheppard*, 197 N.J. Super. 411, 484 A.2d 1330, 1334-37 (1984); Avery, *The Child Abuse Witness: Potential for Secondary Victimization*, 7 Crim. Just. J. 1, 3-4 (1983); Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 Wayne L. Rev. 977, 998-999 (1969); Myers, *The Legal Response to Child Abuse: In the Best Interests of Children?*, 24 J. Fam. L. 146, 182-184 (1985-86); Melton, *Child Witness and the First Amendment: A Psychological Dilemma*, 40 J. Soc. Issues 109, 110 (No. 2 1984); J. Bulkley & H. Davidson, *Child Sexual Abuse—Legal Issues and Approaches* 11 (1980).

Testifying in sight of the defendant may not only be harmful to the child, it may also weaken the state's case.

The trauma may contribute to the child "freezing" on the witness stand, fidgeting, stammering, and in general casting false doubt upon his or her credibility and veracity. If the child is unable to testify effectively, the case may be dismissed.

A second problem concerns the inherent difficulties in the prosecution of child molestation cases. As this Court recently observed, "[c]hild abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim." *Pennsylvania v. Ritchie*, 480 U.S. ——, 107 S. Ct. 989, 94 L.Ed. 2d 40, 59 (1987). Even where other eyewitnesses exist, they may be persons who are unwilling to testify against a family member in cases of intrafamily abuse. Moreover, most sexual offenses against children involve acts that produce no physical evidence, or are revealed to authorities long after potential medical and physical evidence has disappeared. Child sexual abuse can be a long-term form of exploitation, often undetected for months and even years. MacFarlane, *supra*; J. Herman, *Father-Daughter Incest* (1981); S. Butler, *The Conspiracy of Silence* (1978). Indeed, part of the pattern of such abuse is its secrecy; offenders often employ numerous strategies to keep it secret, including threats, force, bribery and intimidation. Consequently, these cases are often brought to public attention and prosecuted weeks or even months after the abusive incidents took place. It has been estimated that in less than 20 percent of child sexual abuse cases is there medical or physical evidence present. Jones & McGraw, *Reliable and Fictitious Accounts of Sexual Abuse to Children*, 2 J. Interpersonal Violence 27, 35 (March, 1987).

State legislatures, over the past five years, have enacted a variety of laws seeking to deal with these problems. Some of the laws attempt to minimize potential trauma to child witnesses by allowing them to testify outside the presence of the defendant, trier-of-fact, or public.

These laws provide for the live testimony of the child at trial by means of one-way, closed-circuit television. Under this procedure, the defendant and jury can view and hear the child on a television monitor, but the child cannot see the persons in the courtroom. The statutes vary as to whether or not the judge or counsel are in the room with the child. Most importantly, the use of one-way closed-circuit television preserves the defendant's right to effective cross-examination. At present, the ABA has identified 21 states (see Appendix) which, by statute or court rule, allow for the use of one-way closed-circuit television testimony. Of these statutes, 18 specifically provide that the child shall not see or hear the defendant while testifying. In addition, 15 of the statutes which allow a child's videotaped deposition or prior testimony to be admitted into evidence permit the defendant to be in the room with the child during the making of the videotape, but hidden from the child's view. See Appendix. It is worth noting that all of these statutes have been enacted since 1983, and even more jurisdictions may be expected to follow this trend.

The Iowa statute at issue in this case requires the child's testimony to be taken in court, but provides that the defendant may be placed behind a one-way screen or mirror "that permits the party to hear the child during the child's testimony, but does not allow the child to see or hear the defendant." Iowa Code § 910A.3(1) (Supp. 1985). This statute appears to be the only one of its kind, but numerous commentators have endorsed the use of such one-way shields. *See, e.g.*, Parker, *The Rights of Child Witnesses: Is the Court a Protector or a Perpetrator?*, 17 New Eng. L. Rev. 643, 669 (1981-1982); Libai, *The Protection of the Child Victim of Sexual Offense in the Criminal Justice System*, 15 Wayne L. Rev. 977, 1017 (1969). *See, also*, Bill C-15 § 14 (1987) (enacted, but not yet proclaimed in force), amending the Canadian Criminal Code and Canada Evidence Act,

which provides that the judge may "order the complainant [to] testify . . . behind a screen or other device that would allow the complainant not to see the accused."

Other state laws, court rules and decisions, and prosecutorial practices have been implemented in recent years to assist in the prosecution of these cases and to help reduce trauma to child victims. *See* R. Eatman and J. Bulkley, *Protecting Child Victim/Witnesses: Sample Laws and Materials* (2d ed. 1987); *Innovations in the Prosecution of Child Sexual Abuse Cases* (J. Bulkley ed. 1981); D. Whitcomb, E. Shapiro, and L. Stellwagen, *When the Victim is a Child: Issues for Judges and Prosecutors* (1985). These include provisions to: 1) liberalize the competency requirements of minor witnesses, modeled after Fed. R. Evid. 601; 2) allow for the use of anatomically correct dolls while the child is testifying; 3) require speedy trials; 4) permit admission of videotaped interviews of child victims; 5) establish special hearsay exceptions for the child victim's out-of-court statement of abuse; 6) close the courtroom to the press or public during the child's testimony; 7) eliminate corroboration requirements of the child's testimony; 8) provide special victim-witness assistance; 9) permit greater use of expert testimony; 10) allow admission of the child's videotaped deposition or prior testimony; and 11) authorize use of two-way closed-circuit televising of the child's testimony.[4]

Congress also has endorsed such procedural reforms. In 1986, as part of its Continuing Appropriations Act for fiscal year 1987, it enacted the Child Abuse Victim's Rights Act, Pub. L. No. 99-591, §§ 701-705, 100 Stat. 3341-74. This Act requires the Attorney General to report to Congress on federal courtroom procedures which would "facilitate the participation of child witnesses in

[4] Statutes providing for the use of videtotaped testimony and two-way closed-circuit television are listed in the Appendix.

cases involving child abuse and sexual exploitation." *Id.* at § 705(a), 100 Stat. 3341-75. Also in 1986, Congress enacted the Children's Justice and Assistance Act, Pub. L. No. 99-401, 100 Stat. 903, under which federal funds would be made available to assist states to implement many of these reforms, including closed-circuit televising of a child's testimony. Such reforms, in Congress' words, were to help "limit additional trauma to the child victim." 42 U.S.C.A. § 5103 (Supp. 1987).

Taken together, these laws and practices evidence a growing awareness of the need to reduce the trauma to child victims called upon to testify in cases involving sexual abuse or physical violence, as well as to aid in the prosecution of these cases. Expressions of such awareness may be found in the "purpose clauses" of many of these laws. For example, Congress, in enacting the Child Abuse Victim's Rights Act, stated that:

> Current rules of evidence, criminal procedure, and civil procedure and other courtroom and investigative procedures inhibit the participation of child victims as witnesses and damage their credibility when they do testify, impairing the prosecution of child exploitation offenses. Pub. L. No. 99-591, § 702(4).

Similar statements may be found in the recommendations of numerous government task forces, advisory bodies, and professional associations which have recommended use of these alternative testimonial procedures. *See, e.g.*, California Attorney General John K. Van de Kamp's Commission on the Enforcement of Child Abuse Laws, *Final Report* (1985); National Council of Juvenile and Family Court Judges, Metropolitan Courts Judges Committee, *Deprived Children: A Judicial Response*, 37 Juv. & Fam. Ct. J. 1, 16-17 (Vol. 4 1986). In May, 1985, the Board of Directors of the National District Attorneys Association endorsed, *in toto*, the ABA *Child Witness Guidelines*.

Moreover, in a case involving a statute which provided for the closing of criminal trials during the testimony of child sexual assault victims, this Court, too, has recognized the government's "compelling" interest in "safeguarding the physical and psychological well-being of a minor" victim. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982).

In most respects, use of a one-way screen during a child's testimony is one of "the least restrictive methods" of obtaining testimony while preserving the defendant's right of confrontation. *McGuire v. State*, 288 Ark. 388, 706 S.W.2d 360, 361 (1986) (upholding a statute permitting use of a videotaped deposition of a child). Use of one-way screens generally only blocks the defendant from the child witness' line of sight. It does not prevent: 1) the jury from observing and assessing the demeanor and credibility of the child; 2) the child from testifying under oath; 3) the defense counsel from subjecting the child to immediate, unrestricted cross-examination; 4) the judge, jury, public and counsel from directly seeing, and being seen by, the witness; 5) the defendant from seeing and hearing the child and conferring with counsel while testimony is taking place; 6) the jury from observing the demeanor of the defendant; and 7) the judge from exercising immediate control over the examination of the witness. In *California v. Green*, 399 U.S. 149, 158 (1970), the Court found that the essential purposes of confrontation were served by the first three items.

This procedure admittedly limits the defendant's right to "face-to-face" confrontation. However, this Court has repeatedly found that such confrontation, though preferred, is not constitutionally mandated in all cases. *Ohio v. Roberts*, 448 U.S. 56, 65 (1980). Provided that safeguards such as those listed above are assured, the most important being the opportunity for full cross-examination, "competing interests . . . may warrant dispensing with confrontation at trial." *Id.* at 64, *citing*

Mattox v. United States, 156 U.S. 237, 243 (1895). This has been most recently reaffirmed by two cases which, coincidentally, involved sexual offenses against children. *Pennsylvania v. Ritchie*, 480 U.S. ——, 107 S. Ct. 989, 999 (1987); *Kentucky v. Stincer*, 482 U.S. ——, 107 S. Ct. 2659, 2664 (1987). It has also been the basis, in a series of state court decisions, for upholding the use of one-way testimony by videotaped deposition, closed-circuit television, or having the defendant sit in an adjacent room while the child testifies. *See, e.g., In the Matter of the Appeal in Pinal County Juvenile Action, Nos. J-1123 and J-1124*, 147 Ariz. 302, 709 P.2d 1361 (1986); *Commonwealth v. Willis*, 716 S.W.2d 224 (Ky. 1986); *State v. Daniels*, 484 So. 2d 941, 944 (La. Ct. App. 1986); *State v. Sheppard*, 197 N.J. Super. 411, 484 A.2d 1330 (N.J. Super. 1984); *State v. Tafoya*, 105 N.M. 117, 729 P.2d 1371 (Ct. App. 1986), *petition for cert. filed*, 55 U.S.L.W. 3665 (U.S. Feb 2, 1987) (No. 86-1343); *State v. Cooper*, 291 S.C. 351, 353 SE.2d 451 (1987).

At issue in this case is a "trial technique [which] serves as the functional equivalent of [regular] in-court testimony." *State v. Daniels*, 484 So. 2d 941, 945 (La. Ct. App. 1986) (neither due process nor confrontation is violated by allowing closed-circuit television in which the defendant was in the room with, but fully screened from, the child). *Accord, Commonwealth v. Willis*, 716 S.W.2d 224, 228 (Ky. 1986) (upholding the use of closed-circuit television, videotaped depositions and one-way screens or mirrors). Given the number of safeguards in place, trial court judges may properly authorize the use of a one-way screen during the taking of testimony of a child witness who has been sexually abused.

II. IN DETERMINING WHETHER TO USE AN ALTERNATIVE TESTIMONIAL PROCEDURE, THE TRIAL COURT MAY CONSIDER A VARIETY OF FACTORS, BUT IN NO CASE SHOULD THE DETERMINATION PROCESS ITSELF SUBJECT THE CHILD TO TRAUMA.

Numerous factors may be considered by the trial court in determining, on a case-by-case basis, whether to use an alternative testimonial procedure during the child's testimony. The Iowa statute, and all laws identified in the Appendix, provide for such exercise of discretion. These statutes represent reasonable attempts by state legislatures to narrow the use of special procedures to the most appropriate cases. All of the statutes, including Iowa's (by cross-reference to Iowa Code Ann. § 702.5), limit the use of closed-circuit television to cases in which the child is below a certain age. The vast majority of these statutes further restrict the testimonial procedures to children who are alleged victims of certain types of crimes. These represent two criteria which, even if not required by legislation, obviously are factors which a judge should consider in exercising discretion in such cases. *See, Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982).

Other criteria have been suggested by some state legislatures and courts. See Appendix for statutory criteria. They include, for example, the child's fear of the defendant (*see, e.g., People v. Henderson*, 132 Misc.2d 51, 503 N.Y.S.2d 238, 240 (Sup. Ct. 1986)), handicap, disability, reaction to previous interviews, and past history of abuse. They might also include questions on the child's relationship to the defendant, e.g., are they related, were threats made, does the defendant occupy a position of authority over the child, or is the child likely to feel guilty if the defendant is incarcerated? *See, generally*, J. Myers, *Child Witness Law and Practice* 391-392 (1987), in which 30 criteria are enumerated. The absence of such additional factors in the statute, however, does not render it unconstitutional. *McGuire v. State*, 288 Ark. 388, 706 S.W.2d 360, 363 (1986). Rather, these factors, where relevant to the case, may be considered by the trial judge and, to avoid reversal based on abuse of discretion, made part of the record. *Commonwealth v. Willis*, 716 S.W.2d 224, 230 (Ky. 1986); *State v. Daniels*, 484 So. 2d 941, 943 n.2 (La. Ct. App. 1986).

It is, of course, important that children be protected from the "secondary victimization" of testifying in adversarial litigation. Relevant information on whether to use alternative testimonial procedures may be presented to the court from various sources and in numerous ways. It is, however, vital that any method employed to determine whether to use such procedures should not itself subject the child to trauma. Subjecting children to one form of psychological trauma to protect them from another would be irresponsible. Thus, it would be self-defeating to subject the child to a grueling *voir dire* examination or, *after* the child has been called to testify, to delay the proceedings while this issue is being resolved.

In most cases it is unnecessary and inappropriate to order an evaluation of a child to determine the need for using alternative testimonial procedures.[5] Courts are increasingly sensitive to the fact that compelled psychiatric or psychological evaluation is often an undesirable invasion of privacy. *See, United States v. Rcineri*, 670 F.2d 702 (7th Cir.), *cert. denied*, 459 U.S. 1035 (1982); *Collins v. United States*, 491 A.2d 480, 484 (D.C. 1985); *State v. R.W.*, 104 N.J. 14, 514 A.2d 1287, 1294 (1986).

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[5] *Cf. People v. Lucerno*, 724 P.2d 1374 (Colo. Ct. App. 1986); *State v. R.W.*, 104 N.J. 14, 514 A.2d 1287 (1986); and *State v. Ballard*, 714 S.W.2d 284 (Tenn. Crim. App. 1986), in which the courts held that psychological examinations of children were not necessary to determine their competency to testify.

Indeed, courts have held that expert testimony is not required to justify the use of alternative testimonial devices in these cases. *See, Chappell v. State*, 18 Ark. App. 26, 710 S.W.2d 214 (1986); *Washington v. State*, 452 So. 2d 82 (Fla. Dist. Ct. App. 1984). Not requiring expert testimony is logical when one considers that most of the criteria a judge would consider in exercising his or her discretion (e.g., nature of crime, relationship of victim to defendant, existence of prior threats, child's refusal to testify) are based upon observations and knowledge within a lay person's competency.

Sufficient information to warrant use of the one-way screen can be obtained from a variety of sources. Parents and family members can assist the court. *See, e.g., McGuire v. State*, 228 Ark. 388, 706 S.W.2d 360 (1986) (grandparents). A guardian *ad litem* or child-victim advocate may "be especially helpful . . . when the judge feels unsure concerning how to proceed with the child's testimony and feels a need for independent advice on how best to protect the child." Hardin, *Guardians Ad Litem for Child Victims in Criminal Proceedings*, 25 J. Fam. L. —— (in press 1987). A social worker or another person intimately familiar with the child may shed additional light on the situation. *See, e.g., Chappell v. State*, 18 Ark. App. 26, 710 S.W.2d 214 (1986). In the rare case where expert opinion is desirable, this may usually be obtained without subjecting the child to special examinations. Many sex abuse victims are under the care of mental health professionals. The court can draw on these professionals for information about the child's vulnerability without the need for further evaluation.

CONCLUSION

When necessary to permit full and candid testimony by a child victim, or to avoid additional emotional trauma to a child witness, the use of a one-way screen should be permitted provided the constitutional rights of the defendant are not impaired.

Respectfully submitted,

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APPENDIX

APPENDIX

I. *One-way Closed-Circuit Television, One-way Screen and One-way Mirror Statutes*

The following twenty-one statutes [1] allow for the use of closed-circuit television to simultaneously broadcast the child's live testimony from one room to another during trial. Such telecasts are *one-way*: unless otherwise indicated, the child cannot see the defendant or other persons in the courtroom. The Iowa statute is the only one which provides an alternative to the process of having the child testify from another room. It allows the defendant to be seated in an adjacent room or behind a screen or mirror while the child testifies. The following statutory descriptions include information on: a) who may request the procedure; b) the age limits of the child; c) whether the procedure is limited to use for certain types of crimes; and d) what, if any, other criteria the judge may consider. All of these statutes leave the decision to the judge's discretion. Unless otherwise stated, only the attorneys and equipment operators or technicians, and sometimes the equivalent of a child-victim support person, are allowed in the room with the child while he or she testifies. The date which follows the description of each law is the year of its enactment.

Ala. Code § 15-25-3 (Supp. 1986)—The court may, upon motion of either party, order such procedures in criminal prosecutions involving a witness 16 years of age or younger, taking into consideration the age and the maturity of child, the nature of the offense, the nature of the testimony and the possible effect such testimony would have on the victim witness, and other relevant matters that may be required by state supreme court rule. The defendant must be in the room with the child. (1985)

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[1] The statutory information provided in this Appendix, to the *Amicus Curiae's* knowledge, is current to August 1, 1987.

Ariz. Rev. Stat. Ann. § 13-4253 (Supp. 1986)—Upon motion of the prosecution in a proceeding involving an offense committed against or witnessed by the minor, the court may order this procedure for a minor under the age of 15. (1985)

Conn. Gen. Stat. § 54-86g (Supp. 1987)—The court may, upon motion of any party, order use of this procedure, with the judge being in the room where the child testifies, for a minor victim of assault, sexual assault or abuse, if the child is 12 years of age or younger. (1985)

Fla. Stat. Ann. § 92.54 (West Supp. 1987)—In a prosecution for a criminal sexual offense the court may, upon motion by any party, order use of this procedure, with the judge in the room when a child 16 years of age or younger testifies, upon a finding of a substantial likelihood that the child victim of a sexual offense will suffer at least moderate emotional or mental harm if required to testify in open court. The court must make specific findings of fact, on the record, as to the basis for approving this procedure. (1985)

Ga. Code Ann. § 17-8-55 (Supp. 1987)—Upon motion of either party, the court may clear the courtroom of all persons except the judge, the counsel for the parties, the defendant, the bailiff, and victim support personnel and provide for the proceedings to be televised live to the jury upon findings that the victim of certain offenses who is 14 years of age or younger has a substantial likelihood to suffer severe emotional or mental distress if required to testify in open court, and when the rights of the defendant will not be unduly prejudiced. (1985)

Ind. Code Ann. § 35-37-4-8 (Burns 1986)—The court may upon motion of the prosecutor order that testimony of a child be taken in a room other than the courtroom and transmitted into the courtroom by closed-circuit television when the child is younger than 10 years of age and is the alleged victim of felonies of sexual contact or

child neglect, or is a witness for such offense, or it is found by the court to be a child of unspecified age who should be permitted to testify outside the courtroom because of the likelihood of trauma as certified to by a psychiatrist, or as established by other evidence where the court so finds that in-court testimony would be a traumatic experience for the child. (1986)

Iowa Code § 910A.14 (Supp. 1985) (formerly § 910A.3)—Upon its own motion or upon motion for either party, in a proceeding when the child is under the age of 14, the court may order use of the one-way closed-circuit television, or the confinement of the witness behind a screen or mirror, at the same time insuring that the party and counsel can confer, and informing the child that he or she can be seen and heard. (1985)

Kan. Stat. Ann. § 38-1558 (1986)—Upon motion from any party, the court may order this procedure for a child victim or a material child witness alleging abuse or neglect, who is less than 13 years of age. (1985)

Ky. Rev. Stat. Ann. § 421-350(1), (3) (Baldwin 1986)—The court may, on a motion from either party, order the use of this procedure when the offense is against a child of 12 years of age or younger. (1984)

La. Rev. Stat. Ann. § 15:283 (West Supp. 1987)—On its own motion or a motion from any party, the court may, when justice so requires, order this procedure when a child is under 14 years of age and may have been physically or sexually abused. (1984)

Md. Cts. & Jud. Proc. Code Ann. § 9-102 (Supp. 1986)—The court may order the use of this procedure in certain cases of child abuse when the judge determines that testimony by the child victim, age 18 or younger, will result in the child suffering serious emotional distress such that the child cannot reasonably communicate. (1985)

Mass. Gen. Laws Ann. § 278, § 16D (West Supp. 1987)—The court, on its own motion or a motion from a

proponent of the child, and after a hearing, may order the use of this procedure when a child witness to certain violations is under the age of 15. The court must find by a preponderance of the evidence that the child is likely to suffer psychological or emotional trauma by testifying in open court or in the presence of the defendant. Findings are to be entered into the record describing with particularity the reasons for such order. (1986)

Minn. Stat. Ann. § 595.02, subd. 4 (West Supp. 1987)—Upon its own motion or the motion of any party, the court may order this procedure in a criminal prosecution in which a child less than 10 years of age is describing an act of physical or sexual abuse, when the court determines that the presence of the defendant would psychologically traumatize the child so as to render the child unavailable to testify. (1984)

Miss. Code Ann. § 13-1-405 (1986)—Upon its own motion or the motion of any party, and upon a hearing in camera, the court may order this procedure in a criminal prosecution involving a victim or witness under the age of 16 in a sexual offense case, upon a finding based on specific behavioral indicators exhibited by the child and the substantial likelihood that the defendant's presence would cause the child to suffer traumatic emotional or mental distress if compelled to testify in open court. The court must make specific findings of fact, on the record, as to the basis for its ruling. (1984)

N.J. Rev. Stat. § 2A:84A-32.4 (1985)—The court may, on its own motion or on motion of any party, and after conducting a hearing in camera, order these procedures for the prosecution of certain criminal sexual contact, only if the witness is 16 years of age or younger and the court finds there is substantial likelihood that the witness would suffer severe emotional or mental distress if required to testify in open court. The order is to be specific as to whether the witness will testify outside the

presence of spectators, the defendant, or the jury, and the order shall be based on specific findings on the impact of the presence of each. (1985)

Okla. Stat. Ann. tit. 22, § 753 (West Supp. 1987)—The court may, on its own motion or on the motion of any party, order this procedure in the prosecution of an offense against a child 12 years of age or younger. (1984)

Pa. Stat. Ann. tit. 42, §§ 5982, 5985 (Purdon 1986)—Upon a request by a parent or guardian, the child's advocate, or the attorney for the Commonwealth, the court may, for good cause shown, order these procedures when the child victim or material witness is 14 years of age. In cases of children between 14 and 15, there is a rebuttable presumption that they would benefit from the use of this procedure. (1986)

R.I. Gen. Laws § 11-37-13.2 (Supp. 1986)—In any proceeding in which a person has been charged with sexual assault of a child who is 17 years of age or younger, the court may order these procedures upon a showing that the child is unable to testify without suffering unreasonable or unnecessary mental or emotional harm. When the child is 13 years old or younger there shall be a rebuttable presumption that said child is unable to testify without suffering unreasonable and unnecessary harm. (1983)

Tex. Code Crim. Proc. Ann. art. 38.071, § 3 (Vernon Supp. 1987)—The court may, on motion from any party, use this procedure in the prosecution of certain offenses under Chapter 21, Penal Code, involving a child 12 years of age or younger. (1983)

Utah Code Ann. § 77-35-15.5(3) (Supp. 1987)—Upon motion of the prosecution, and for good cause shown, the court may order the use of this procedure in any case concerning a charge of child abuse or of a sexual offense against a child, when the witness is younger than 12 years of age. The court must either determine that the

child will suffer serious emotional or mental strain, or that the child's testimony would be inherently unreliable, if the child was required to testify in the defendant's presence. (1985)

Vt. R. Evid. § 807 (Supp. 1986)—Upon the motion of the court or motion of any party, the court may use this procedure in a prosecution for certain crimes of sexual assault or lascivious conduct or incest against a child age 12 or younger, when, during the taking of such testimony through two-way closed-circuit equipment, the court finds that requiring the child to hear and see the defendant presents substantial risk of trauma, thus substantially impairing the ability of the child to testify. (1985)

II. *Two-Way Closed-Circuit Television Statutes*

The following five statutes allow for the simultaneous live broadcasting of the child's testimony. However, such telecasts are *two-way*: the testimony and image of child is transmitted live by means of closed-circuit television into the courtroom. The image of the jury and the defendant, and the image and voice of the person examining the child witness may be simultaneously transmitted to the child witness in the testimonial room. The following statutory descriptions include information on: a) those who may request the procedures; b) the age limits for the child witness; c) the types of crimes the procedure may be used for; and d) what if any, criteria the judge may consider. All of these statutes leave the decision on whether to use these procedures to the judge's discretion. Unless otherwise stated, only the attorneys and equipment operators or technicians, and sometimes a child victim support person or equivalent, are allowed in the room with the child while he or she testifies.

Cal. Penal Code § 1347 (West 1986)—The court, in any criminal proceeding, upon written notice by the prosecutor made at least three days prior to the date of the prelimi-

nary hearing or trial date on which the testimony of a child is scheduled, or during the course of the proceeding at the court's own motion, may order the use of this procedure, so that attorneys question the child over television monitors, when the witness is a child 10 years of age or younger, if the court makes the following findings: a) the child will recite facts of an alleged sexual offense; and b) the impact on the child is shown by clear and convincing evidence to be so substantial as to make the child unavailable as a witness unless closed-circuit television is used because of one or more of the following factors: threats against the child or family member involving bodily harm, incarceration or deportation; threats of removal of the child from the home or family; use of a firearm during the crime; infliction of great bodily injury on the child during the crime; or other conduct on the part of the defendant or counsel which causes the child to be unable to continue his or her testimony. Upon ordering this procedure, the court shall make a brief statement on the record, outside the presence of the jury, of the reasons in support of this order; instruct the jury that they are to draw no inferences from the use of the procedure; instruct respective counsel, outside the presence of the jury, to make no comment during the course of the trial on the use of the two-way closed-circuit procedure; and instruct the child's support person, outside the presence of the jury, that they are not to coach the child. (1984)

1985 Haw. Sess. Laws (Act 279)—The court, upon a motion by any party, may order this procedure in any proceeding involving a child witness. The defendant's presence on the video monitor should not be unduly emphasized to the child. (1985)

N.Y. Crim. Proc. Law §§ 65.00 to 65.30 (McKinney Supp. 1987)—Upon an ex parte application from the district attorney to the court, the court may order the use

of this procedure when the court determines by clear and convincing evidence that it is likely that a child witness 12 years of age or younger, called to testify in a criminal proceeding, will suffer severe mental or emotional harm if required to testify without the use of live, two-way closed-circuit television. The motion papers must state the basis for the motion and must contain sworn allegations of fact which would support a determination by the court that the child witness is vulnerable. Notwithstanding any other provision of law, the child witness may not be compelled to testify at such hearing in determination of the motion. Any physician, psychologist, nurse or social worker who has treated a child witness may testify at a hearing to determine whether the child witness is vulnerable. The court may consider, in determining whether there are such extraordinary circumstances as would cause the child witness to suffer severe mental or emotional harm, a finding that any one or more of the following factors have been established by clear and convincing evidence: a) the manner of the commission of the offense; b) that the child witness is particularly young or particularly subject to psychological harm; c) that the defendant occupied a position of authority with respect to the child witness; d) that the offense was part of an ongoing course of conduct; e) that a deadly weapon or dangerous instrument was allegedly used during commission of crime; f) that the defendant has inflicted serious physical injury upon the child; g) that a threat of physical violence, if the child were to report the incident, has been made; h) that a threat of removal of a child witness from the family was made; and i) that the defendant, at the time of the inquiry, is living in the same household with the child witness, has access to the child, or is providing substantial financial support for the child witness. The court shall make findings of fact which reflect the casual relationship between the factors set forth and the determination that the child witness is vulnerable. Upon request of the defendant, the court

shall instruct the jury that they are to draw no inference from the use of two-way closed-circuit television. (1985)

Ohio Rev. Code Ann. § 2907.41(C), (E) (Supp. 1987)—In a criminal proceeding for sexual offenses, upon a motion of any party or on the court's own motion, the court many order the use of this procedure when a child witness is under age 11 at the time the proceeding is initiated, upon a finding that the child will otherwise refuse to testify, will be unable to communicate because of extreme fear, failure of memory, or for some other reason, or that there is substantial likelihood that he or she will suffer serious emotional trauma from testifying in the defendant's presence. (1985)

Vt. R. Evid. § 807 (Supp. 1986)—In a proceeding for certain crimes of sexual assault, lascivious conduct, or incest, upon motion of the court or any party, the court may use this procedure for testimony given by a child witness age 12 years of age or younger upon a finding that requiring the child to testify in court will present a substantial risk of trauma and impair the ability of the child to testify. (1985)

III. *Videotaped Deposition and Prior Testimony Statutes*

The following thirty-three statutes permit the use of a child's videotaped deposition or prior testimony at trial. Unless specifically noted, neither the preparation nor the presentation of such a videotape shall preclude the calling of the child victim to testify in-person at trial. Also, unless otherwise noted, the defendant must be present at the deposition or prior testimony and not hidden from the child's view.

Ala. Code § 15-25-2 (Supp. 1986)—In any criminal prosecution, upon application by the prosecutor and after notice to defendant, the court may order, for good cause shown, the taking of a videotaped deposition of an alleged victim under 16 years of age, taking into consid-

eration the child's age and maturity, the nature of the offense, the nature of testimony, and the possible effect it may have upon the victim if required to testify in the courtroom. Such testimony may be admitted in lieu of the child's appearance at trial unless the court finds that this will unfairly prejudice the defendant. (1985)

Alaska Stat. § 12.45.047 (1984)—Upon the application of the prosecutor and with notice to the defendant, the court shall permit the videotaped deposition of a child 16 years of age or younger who is an alleged victim of sexual assault or unlawful exploitation of a minor. (1983)

Ariz. Rev. Stat. Ann. §§ 13-4251 and 4253(B), (C) (Supp. 1986)—Upon the application of the prosecutor and notice to the defendant, and for good cause shown, the court may permit the videotaped deposition of a child who is 15 years of age or younger testifying in a criminal or civil proceeding, including dependency or termination of parental rights case. If the court orders this procedure, the minor shall not be required to testify in court at the proceeding for which the video was made. (1985)

Ark. Stat. Ann. §§ 43-2035 to 2037 (Supp. 1985)—In any prosecution for a sexual offense, upon a motion by the prosecution and notice to the defendant, the court may, for good cause shown, order the taking of a videotaped deposition of an alleged victim under the age of 17, taken before the judge, in chambers. However, the court must ensure that the child cannot hear or see the defendant. If the court orders such a deposition, the child shall not be required to testify at trial. (1983)

Cal. Penal Code § 1346 (West 1986)—Upon application by the prosecutor made prior to the preliminary hearing, and with notice to a defendant charged with criminal assault or sexual offenses, the court may permit the taking of videotaped preliminary hearing testimony of a child 15 years of age or younger. If at the time of trial the court finds that testifying would cause the child witness emotional trauma, the videotape shall be admitted as former testimony. (1983)

Colo. Rev. Stat. § 18-3-413 and § 18-6-401.3 (1986)—When a defendant is charged with an unlawful sexual offense and the victim is less than 15 years of age, and upon the prosecutor's timely application and notice to the defendant, the court may order a deposition based on a preliminary finding that a child is likely to be unavailable at the time of trial, based on recommendations from the child's therapist and others with direct contact with the child who have observed specific behavioral indicators exhibited by the child. At time of trial, if the court finds that further testimony would cause the victim emotional trauma so as to render the child unavailable as a witness, the videotape is to be admitted. (1984)

Conn. Gen. Stat. § 54-86g (Supp. 1987)—In a prosecution involving assault, sexual assault or abuse of a child 12 years of age or younger, the court may, upon motion of either party, order that a videotape be made of the testimony of a child for later showing in court. If the court orders that testimony of a child be taken under this procedure, the child shall not be required to later testify in court in a proceeding for which such testimony was taken. During such videotaped testimony, the court shall ensure that the child cannot hear or see the defendant. (1985)

Del. Code Ann. tit. 11, § 3511 (Supp. 1986)—At any criminal case or delinquency hearing, upon motion of the state prior to trial and with notice to the defendant, the court may order all questioning of a witness under 12 years of age to be videotaped in a location designated by the court. The witness may then not be compelled to testify at the trial or hearing for which the testimony was taken. The court may exclude the defendant from the deposition room, but must permit him to observe and hear the child. (1985)

Fla. Stat. § 92.53 (Supp. 1987)—On motion of either party, and after a hearing in camera and a finding of substantial likelihood that a sexual abuse or child abuse victim or witness under the age of 16 would suffer moderate emotional or mental harm, the court may order the videotaping of testimony. The court may require that the defendant be outside the view of the child by means of a two-way mirror or other method. The videotaped testimony shall not be admissible when at trial such witness testifies by use of closed-circuit television. (1985)

Ind. Code Ann. § 35-37-4-8(c), (d), (f), (g) (Burns 1986)—In criminal actions for felonies of sexual conduct with a minor or for child neglect, on the motion of the prosecutor, the court may order that the testimony of a child be videotaped for use at trial when the child is less than 10 years of age, or upon finding that a psychiatrist has certified that the child's testifying in the courtroom would be traumatic or upon evidence that has been introduced concerning the traumatic effect of the child's testifying in the courtroom. (1985)

Iowa Code Ann. § 910A.14 (Supp. 1985) (formerly § 910A.3)—The court may, upon its own motion or upon the motion of any party, order that the testimony of a child under the age of 14 years be taken by videotaped deposition for use at trial pursuant to the rules of criminal procedures, or, when the child may describe sexual contact, upon a showing that the recording would substantially comport with state evidentiary rules. (1985)

Kan. Stat. Ann. § 24-3434 (1986)—The court, upon its own motion or the motion of any party, may order the use of a videotaped recording of a deposition of a child victim or witness who is younger that 13 years of age testifying in a criminal proceeding. The court shall ensure that the child cannot hear or see the defendant. If the court orders such a deposition, the child may not be required to testify live at trial. (1985)

Ky. Rev. Stat. Ann. § 421.350(4) (Baldwin 1986)—The court may, on a motion from either party, order that the testimony of a child under 12 be videotaped for later introduction. During the taking of the videotaped testimony the court shall ensure that the child cannot hear or see the defendant. If the court orders videotaped testimony, the child may not be required to testify later in the proceeding. (1986)

Mass. Gen. Laws Ann. ch. 278, § 16D(b)(2) (West Supp. 1987)—The court on its own motion or motion of a proponent of the child, and after a hearing on whether the child is likely to suffer trauma if testifying in open court and in the presence of the defendant, may order that the testimony of a child witness under the age of 15 years be recorded on videotape and admissible as evidence in lieu of live testimony by the child, and in appropriate circumstances, with the child unable to see or hear the defendant. (1986)

Minn. Stat. Ann. § 595.02(4) (West Supp. 1987)—In a proceeding in which a child less than 10 years of age is alleging an act of abuse or sexual contact, the court may, upon its own motion or a motion of any party, order that the testimony of the child be recorded for later showing to the jury. Unless the court determines that the presence of the defendant during the testimony would psychologically traumatize the witness, the defendant may observe and hear the testimony in person. (1984)

Miss. Code Ann. § 13-1-407 (1986)—Upon motion and after a hearing in camera, the court may, after making specific findings of fact, order that testimony of a victim or witness under the age of 16 years in a sex offense case be videotaped. The court's finding must be based on specific behavioral indicators exhibited by the child and the substantial likelihood that the child will suffer traumatic emotional or mental distress if compelled to testify in open court. If such distress was found to be related to

the child testifying in the presence of the defendant, the defendant can be placed behind a two-way mirror or another method can be used so that the child cannot see or hear the defendant. (1986)

Mo. Rev. Stat. §§ 491.675-491.690 (1986)—The court may order, on motion of the prosecuting attorney, that the defendant be excluded from a child victim videotaped deposition when a child under the age of 17 years is alleged to be a victim of a sexual offense. In ruling on such a motion, the court must consider the offense charged and the emotional or psychological trauma to the child if required to testify in open court or brought into the personal presence of the defendant. (1985)

Mont. Code Ann. §§ 46-15-401 to 403 (1986)—At the request of the victim and with the concurrence of the prosecutor, the court may order that the testimony of any sex offense victim be videotaped for later presentation at trial. (1977)

Nev. Rev. Stat. § 174.227 (1986)—Upon its own motion or the motion of the prosecutor, the court may order a videotaped deposition which may be used at trial. The defendant must be able to see and hear the deposition. Where a child under 14 is to testify at a preliminary hearing or before a grand jury, the court may order that this testimony be videotaped. (1985)

N.H. Rev. Stat. Ann. § 517:13-a (Supp. 1987)—Upon its own motion, motion of any party, or request of the victim, the court may, after a hearing, order a videotaped deposition of a victim's testimony. Where a witness is under 13, a videotaped deposition must be taken unless the court finds that it would in the interest of justice to allow such testimony in open court. The deposition shall be admissible into evidence at trial in lieu of any other testimony of the child. (1984)

N.M. Stat. Ann. § 30-9-17 (1986)—In any prosecution for criminal sexual contact with a minor, upon motion

of the district attorney, the court may, for good cause shown, order the taking of a videotaped deposition of any child under the age of 16 years. The deposition shall be entered into the record at trial in lieu of the child's direct testimony. (1984)

Ohio Rev. Code Ann. § 2907.41(A), (B), (D), (E) (Baldwin Supp. 1987)—Upon application from the prosecution the court may order a videotaped deposition or videotaped testimony when a child witness in a criminal sex offense proceeding is under 11 years of age at the time the proceeding is initiated. In order to use such videotaped testimony, the court must find that the child will either refuse to testify in open court, will be unable to communicate because of extreme fear, failure of memory, or for some other reason, or that there is substantial likelihood that he or she will suffer serious emotional trauma from testifying in the defendant's presence. The court must provide a television monitor in the room where the child gives the testimony or deposition on which the child can observe the defendant. If a videotaped deposition is taken, the child shall not be required to testify in person at trial. (1985)

Okla. Stat. Ann. tit. 22, § 753(C) (West 1986)—The court may, on motion of any party, order that the testimony of the child witness 12 years of age or younger be taken in a room other than the courtroom and be videotaped for showing at trial. During the deposition, the court shall ensure that the child cannot hear or see the defendant. If this procedure is ordered, the child shall not be required to testify live at trial. (1984)

Pa. Stat. Ann. tit. 42, §§ 5982, 5984 (Purdon 1986)—In any prosecution involving a child victim or child material witness under the age of 14, upon motion from either party, the child through a parent or guardian, or upon its own motion, the court may, for good cause shown, require that a deposition be videotaped. The court shall ensure that the child cannot hear or see the defendant. The child may not be required to testify in court at trial

where a videotaped deposition has been taken. There is a rebuttable presumption that a person from 14 to 15 years of age would benefit from this procedure. (1986)

R. I. Gen. Laws § 11-37-13.2 (1986)—In any proceeding in which a person has been charged with sexual assault of a child who is 17 years of age or younger, the court may order videotaped testimony upon a showing that the child would be unable to testify in court without suffering unreasonable or unnecessary mental or emotional harm. When the child is 13 years of age or less, there shall be a rebuttable presumption that the child would suffer such unreasonable and unnecessary harm. The court shall ensure that the child cannot hear or see the defendant. If the court orders such a deposition, the child shall not be required to testify in-court at trial, and the deposition shall be in lieu of live testimony. (1985)

S. C. Code Ann. § 16-3-1530(G) (Law Co-op. 1984)—The solicitor or defense shall notify the court when a child victim or witness deserves special consideration. The court shall treat child witnesses sensitively, using videotaped testimony when appropriate. (1985)

S.D. Code Ann. § 23A-12-9 (Supp. 1987)—Where a defendant is charged with certain sex crimes involving a child 15 years of age or less, upon motion of the prosecutor the court may order that the child victim's testimony at a preliminary hearing be videotaped. If at trial the court finds that further live testimony would cause the child emotional trauma, that the child is otherwise unavailable as a witness, or that such testimony would be substantially detrimental to the well-being of the child, then the videotape may be admitted as evidence. (1983)

Tenn. Code Ann. § 24-27-116(d), (e), (f) (Supp. 1986)—In child sexual abuse proceedings, the court may, on the motion of any party order that the testimony of a child under the age of 13 years be taken outside the courtroom and be videotaped for showing at trial. The

child may not be required to testify in court at the proceeding for which such a recording was made. (1985)

Tex. Code Crim. Proc. Ann. art. 38.071, § 3 (Vernon Supp. 1987)—The court may, on motion of any party, order that the child's testimony be videotaped outside of the courtroom for showing at trial, in the prosecution of certain offenses under Chapter 21, Penal Code, involving a child 12 years of age or younger. The court shall ensure that the child cannot hear or see the defendant. If the court orders the videotaped testimony, the child may not be required to testify live at trial. (1983)

Utah Code Ann. § 77-35-15.5(3), (4) (Supp. 1987)—In any case concerning a charge of child abuse or a sexual offense against a child under 12 years of age, the court may order, upon the motion of the prosecutor and for good cause shown, that the testimony be taken outside the courtroom and recorded on videotape for viewing at trial. The defendant may be hidden from the child's view if the court determines that the child will suffer serious emotional or mental strain, or that the child's testimony would be inherently unreliable, if the child was required to testify in the defendant's presence. The child may not be required to testify live at trial where such videotaped testimony is used. (1985)

Vt. R. Evid. § 807 (Supp. 1986)—In a proceeding for sexual assault, lascivious conduct or incest alleged to have been commited against child witness age 12 years or younger, the court may, on motion of any party, the child's guardian ad litem, or on its own motion, order that the testimony be taken outside the courtroom and recorded on videotape for later viewing. The court may order that the defendant be situated so that the child cannot hear or see him if the court finds that requiring the child to hear and see the defendant presents a substantial risk of trauma to the child which would substantially impair the ability of the child to testify. If the court orders such testimony the child may not be required

to testify live in court, unless otherwise ordered by the court for good cause shown. (1985)

Wis. Stat. Ann. § 967.04(7) to (10) (West 1986)—In any criminal proceeding any party may move the court to order the taking of a videotaped deposition of a child who has been or is likely to be called as a witness prior to his or her 12th birthday, or prior to the child's 16th birthday when the court finds that the interests of justice warrant it. Among the factors that the court may consider in determining the "interest of justice" are: the child's age, level of development, and general health; the nature of the events subject to testimony; the child's custodial situation, attitude of other household members concerning this testimony, and relationship to those involved in the case; the child's behavior at previous interviews; the child's belief about the consequences of the testimony; the child's manifestations of post-traumatic stress disorder and other problem behaviors; and the number of proceedings during which the testimony may be required. If the court orders a videotaped deposition, the child may not be called as a witness at the proceeding in which it is admitted as evidence. (1985)

Wyo. Stat. § 7-11-408 (1987)—In any proceeding in which the defendant is charged with incest or sexual assault of a child less than 12 years of age, the judge may order the taking of a videotaped deposition of the child upon a finding that the best interest of the child would be so served, and that potential physical or psychological harm to the child would be likely to occur at trial if the child was required to testify which would render the child incapable of testifying. The defendant may be hidden from the child's view during the deposition where the defendant is alleged to have inflicted or threatened to inflict physical harm upon the child, and where physical or psychological harm to the child is likely to occur if there is face-to-face confrontation. If the videotape is admitted at trial, the child may not testify in court without the consent of the defendant. (1987)

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
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No. 86-6757

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOHN AVERY COY,

Appellant,

v.

STATE OF IOWA,

Appellee.

ON APPEAL FROM THE
SUPREME COURT OF IOWA

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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STATEMENT OF INTEREST OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia non-profit corporation with a nation-wide membership of more than 4,000 lawyers. NACDL was founded over twenty-five years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice, and to encourage the integrity, independence and expertise of defense lawyers.

Among NACDL's stated objectives is the promotion of the proper administration of criminal justice. Consequently, NACDL is concerned with the protection of individual rights and the improvement of the criminal law, its practices and procedures. A cornerstone

of this organization's objectives, and of the criminal justice system, is the fundamental constitutional protection of an individual's Sixth Amendment right to confrontation of witnesses and Due Process right to a fair trial. NACDL is very concerned about any decision that would undermine or dilute these constitutional guarantees, and argues that adoption of the position taken by the Appellee in the instant case would lead to such a result.

The Amicus Curiae committee of the NACDL has discussed this case and decided that the issues are of such importance to defense lawyers and criminal defendants throughout the nation that NACDL should offer its assistance to the Court. Both the petitioner and the respondent have consented to NACDL's participation as amicus curiae, and letters of consent have been filed with this Court.

SUMMARY OF ARGUMENT

The Supreme Court of Iowa incorrectly held that the Sixth Amendment's Confrontation Clause was not violated by the presence of the screen between the accused and the child witnesses. The Iowa Court also incorrectly held that the Appellant was not denied a fair trial by the creation of a strong and prejudicial inference of guilt because of the use of this device. This Court consistently has held that the Sixth Amendment requires the defendant's presence at all stages of the proceedings when witnesses are testifying. Snyder v. Massachusetts, 291 U.S. 97 (1934).

Implicit in the command of the Confrontation Clause is a face-to-face meeeting between the witness and the accused. Face-to-face confrontation "forms the core of the values furnished by the

confrontation clause." Ohio v. Roberts, 448 U.S. 56, 63 n.5 (1980).

Although public policy and a compelling state interest may require a court to balance a defendant's rights under the Confrontation Clause, Mattox v. United States, 156 U.S. 237 (1895), no such compelling interest exists here. Pointer v. Texas, 380 U.S. 400 91965). No evidence was presented below to establish that a face-to-face meeting at trial would have had an adverse effect on the child witnesses. Therefore, no grounds exist on which to base the denial of this defendant's right to confrontation. According to the American Psychological Association, there is very little social science data to support the belief that a defendant's presence would have a negative psychological effect on child witnesses. Without such data and specific evidence

of injury to the child witnesses in this case, the trial court erred when it denied the defendant the right to confront the child witnesses at trial. Likewise, the procedure utilized here created a specialized screening device which adversely impacted upon Appellant's right to a fair trial.

Throughout the nation, concern over sexual abuse has produced near-hysterical responses. Legislators and prosecutors increasingly have sought to contravene the procedural rights of defendants at trial and even to assume their guilt in child sexual abuse cases by creating procedural devices to reach that result. This has led to a willingness on the part of courts to allow the introduction of unreliable evidence from incompetent witnesses, to permit special hearsay exceptions for child witnesses, and to deny defendants

the right of confrontation. Amicus is extremely concerned that this trend to permit the prosecution to prove its case through unreliable evidence and in violation of the defendant's constitutional right to confrontation will seriously interfere with the fundamental purpose of the confrontation clause to advance "the accuracy of the truth determining process in criminal trials." Tennessee v. Street, 471 U.S. 409, 415 (1985).

ARGUMENT

I: THE USE OF A SCREENING DEVICE BETWEEN THE ACCUSED AND THE CHILD WITNESSES AT TRIAL VIOLATED THE FACE-TO-FACE MEETING REQUIRED BY THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT.

In this direct appeal, Appellant has challenged the physical arrangement of the witness and accused as violating the face-to-face requirement of the Confrontation Clause of the Sixth Amendment of the United States Constitution. Iowa Code Sec. 910A.3, by its terms, authorizes several methods of dealing with any proven witness trauma in child sex abuse cases: (1) closed circuit television, (2) removal of an accused to a separate room or use of a screen between witness and accused, and (3) out-of-court depositions in lieu of live in-court testimony.

This case involves only the use of a screening device. However, the

attention of the Court is respectfully drawn to Tafoya v. New Mexico, No. 86-1343, wherein a petition for writ of certiorari is pending resolution by this Court. Tafoya raises similar yet distinct issues in that a separate room was used for out-of-court depositions of child witnesses, and the accused was hidden away in a viewing booth.

The Coy case represents the first of a wave of restrictive practices authorized by state statutes and trial courts dealing with the appearance of child witnesses in sex abuse cases. While some measure of protection may be constitutionally permissable in these cases (e.g., presence of a parent or therapist while testifying), the extreme practices utilized in Coy and Tafoya violate the Confrontation Clause.

Television and other technology has advanced to a level not contemplated

by the framers of the Constitution; however, arrangements of the type used in this case have generally been disapproved. Annot., Conditions Interfering With Accused's View of Witness as Violation of Right of Confrontation, 19 ALR 4th 1286 (1983); Note, Criminal Defendant has Sixth Amendment Right to Physically Confront Witness at Videotape Deposition, 4 Wash. U.L.Q. 1106 (1979).

Major recent decisions dealing with this question have rejected videotape arrangements where the accused is not allowed to directly "confront" the witness face to face in his presence. United States v. Benfield, 593 F.2d 815 (8th Cir. 1979); Herbert v. Superior Court, 172 Cal. Rptr. 850, 19 ALR 4th 1276 (1981).

A. Historical Foundation for Face-to-Face Requirement.

Several decisions of this Court from the turn of the century bear directly on the question presented in this case, namely, the extent to which physical face-to-face confrontation is required where a witness testifies either in open court or by videotape deposition.

Physical face-to-face meeting while testifying is directly mandated by the Sixth Amendment and such a principle is taken as required by most Supreme Court opinions. Davis v. Alaska, 415 U.S. 308, 315, 94 S.Ct. 1105, 1109 (1974) ("Confrontation means more than being allowed to confront the witness physically.") (emphasis supplied). Elimination of depositions or ex parte affidavits was, to be sure, a goal of the Confrontation Clause, but not the sole interest protected by it, as evidenced by

the historical discussion in California v. Green, 399 U.S. 149, 90 S.Ct. 1930 (1970):

> But objections occasioned by this practice appear primarily to have been aimed at the failure to call the witness to confront personally the defendant at his trial. So far as appears, in claiming confrontation rights no objection was made against receiving a witness' out-of-court depositions or statements, so long as the witness was present at trial to repeat his story and to explain or repudiate any conflicting prior stories before the trier of fact.
>
> Our own decisions seem to have recognized at an early date that it is this literal right to "confront" the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause...(citing Mattox, 156 U.S. at 242-243.)
>
> 399 U.S. at 157,
> 90 S.Ct. at 1934.

The concurring opinion of Justice Harlan posited two opposing theoretical approaches to confrontation, one being a restrictive approach that "...the clause may be read to confer nothing more than a right to meet face to face..." all

witnesses against an accused. 399 U.S. at 175, 90 S.Ct. at 1944. See also opinion of Brennan, J. (dissenting), 399 U.S. at 193 (witness "stands face to face with the accused and the fact finder") (emphasis supplied).

In Mattox, supra, the Supreme Court upheld the use of previously sworn testimony of a deceased witness from the accused's prior trial on the same charge. The rationale for so holding was that both physical confrontation and cross-examination had been fully complied with during the first trial:

> The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of, and many of the very cases which hold testimony such as this to be admissible also hold that not the substance of his testimony only,

> but the very words of the witness, shall be proven.
>
> 156 U.S. at 244, 15 S.Ct. at 340. (emphasis supplied)

In Kirby v. United States, 174 U.S. 47, 19 S.Ct. 574 (1899), the Court reversed a conviction on Confrontation Clause grounds where evidence from a separate trial of a codefendant was introduced in the accused's trial. Justice Harlan stated as his reasoning:

> But a fact which can be primarily established only by witnesses cannot be proved against an accused, charged with a different offense, for which he may be convicted without reference to the principal offender, except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases.
>
> 174 U.S. at 55, 19 S.Ct. at 577 (emphasis supplied).

See also Dowdell v. United States, 221 U.S. 325, 330, 31 S.Ct. 590,

592 (1911) (Philippine Bill of Rights Provision allowing accused "to meet the witnesses face to face" substantially same as 6th Amendment provision, and "intended to secure the right of the accused to meet the witnesses face to face, and to thus sift the testimony produced against him...").

B. Contemporary Treatment of Face-to-Face Requirement.

Contemporary cases have kept faith with these principles. The United States Court of Appeals for the Eighth Circuit held unconstitutional a videotape procedure where the accused was in a separate room. United States v. Benfield, 593 F.2d 815 (8th Cir. 1979). A videotape deposition of a kidnap victim was authorized by the trial court pursuant to Rule 15, F.R.Crim.P., and the court ordered that Benfield could not be "within the vision" of the witness; in

addition, the witness was deceived as to the presence of the defendant in the building and his ability to hear and view the testimony as it was being given. Id. at 820-821.

The Benfield court reviewed some of the same historical development of the Sixth Amendment as referred to above and concluded:

> After carefully considering the sixth amendment, applicable to case law, and this record, we are satisfied that the rights of Benfield were abridged by the above procedure. Normally the right of confrontation includes a face-to-face meeting at trial at which time cross-examination takes place. Mattox, Kirby, Dowdell, and Snyder, which were discussed above, all support that view. While some recent cases use other language, none denies that confrontation required a face-to-face meeting in 1791 and none lessens the force of the sixth amendment. Of course, confrontation requires cross-examination in addition to a face-to-face meeting. Davis v. Alaska, 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 91974). The right of cross-examination reinforces the importance of physical

confrontation. Most believe that in some undefined but real way recollection, veracity, and communication are influenced by face-to-face challenge. This feature is a part of the sixth amendment right additional to the right of cold, logical cross-examination by one's counsel. While a deposition necessarily eliminates face-to-face meeting between witness and jury, we find no justification for further abridgement of the defendant's rights. A video-taped deposition supplies an environment substantially comparable to a trial, but where the defendant was not permitted to be an active participant in the video deposition, this procedural sustitute is constitutionally infirm. Id. at 821 (emphasis supplied).

State courts reaching the merits of the face-to-face requirement have generally found it to be violated when the witness and accused are not physically in each other's view while testifying. Herbert, supra (historical right to face accuser is violated by seating arrangement when witness was not

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required to view accused); Long v. State, 694 S.W.2d 185 (Tex. App. 1985) (statute preventing attendance of accused at videotape deposition violated "face-to-face confrontation" requirement).

C. Why the Screening Device Utilized Here Conflicts With This Court's Interpretation of the Sixth Amendment.

This Court's decision in Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531 (1980), discussed the "preference for face-to-face confrontation at trial", as follows:

> The Court has emphasized that the Confrontation Clause reflects a preference for face-to-face confrontation at trial, and that "a primary interest secured by [the provision] is the right of cross examination." Douglas v. Alabama, 380 U.S. 415, 418 (1965). 100 S.Ct. at 2537.

Footnotes 5 and 6, both of which are linked to the above quotation, are illustrative of the intellectual underpinnings of the face-to-face

confrontation requirement. Footnote 5 cites California v. Green, 399 U.S. 149, 157, 90 S.Ct. 1930, 1934 (1970) for the proposition that "it is this literal right to confront the witnesses at the time of the trial that forms the core of the values furthered by the Confrontation Clause." Footnote 6 cites Green, supra, and states:

> Confrontation at trial also operates to ensure reliability in other ways. First, "the requirement of personal presence... undoubtedly makes it more difficult to lie against someone, particularly if that person is an accused and present at trial." 4 J. Weinstein and M. Berger, Weinstein's Evidence, Sec. 800 [01], pp. 800-10 (1979).

Thus, it is clear that reliability is one of the keys to a proper constitutional analysis. Here, the reliability of the fact-finding process was diminished because the witness was not required to give testimony in the direct view of the accused. The screen interefered with the

face-to-face requirement of the Confrontation Clause in that the witness was not required to testify while seeing the accused. The non-verbal communication elicited by a face-to-face meeting between witness and accused promotes the reliability referred to in Ohio v. Roberts, supra.

II. THE USE OF A SCREENING DEVICE PLACED BETWEEN THE ACCUSED AND CHILD WITNESSES AT TRIAL BRANDED APPELLANT WITH AN UNMISTAKABLE MARK OF GUILT IN VIOLATION OF THE FAIR TRIAL GUARANTEES OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The argument presented here raises an issue of fundamental fairness: that the one-way screening device used in this trial was inherently prejudicial, because it branded the accused with a clearly unmistakable mark of guilt. The cases of Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691 (1976) and Holbrook v. Flynn, 475 U.S. ___, 106 S.Ct. 1310 (1986) set forth the parameters of this discussion. The prison garb in Estelle is analogous to the screening device used here because it inexorably drew the jury's attention to the need to separate the "guilty" defendant from the witness, based upon some apparent fear the witness had of viewing her perpetrator. The jurors

would see the screen in the same light as the prison clothing. The range of inferences to be drawn from the screen is similarly narrow because the device was utilized only for the child witnesses. Their non-verbal communication of fear in the courtroom would have drawn the constant attention of the jury to this device.

By contrast, the extra security in the courtroom in Holbrook was merely incident to the conduct of court business, and did not interfere with the jury's view of accused and witness; nor were jurors required to see the security guards at all times when viewing the open court proceedings.

Reliability is also a factor in the fair trial analysis, since a device which interferes with obtaining reliable testimony may unfairly brand an individual as guilty.

As indicated in Point I, supra, personal presence of the accused makes it more difficult to lie when confronting the witness face-to-face. Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 2537 (1980) citing 4 J. Weinstein and M. Berger, Weinstein's Evidence, Sec. 800 [01], pp. 800-10 (1979).

It was not necessary to damage the fair trial rights of the accused by the screening device; the trial court could have ordered out-of-court videotape depositions with the presence of the accused in a two-way view while testifying. An emotionally significant person could be present with the witness (out of sight of the television); such a scenario would minimize any hypothetical trauma. But the device used here violated the fair trial rights of Appellant. The device emphasized the inference that the accused was

responsible for any witness trauma (whether correct or not), and as such was impermissible.

There might arise a situation where such a device (or the banishment of the accused from the courtroom) would be warranted by specific misconduct of the accused, conduct which was intimidating to the witness while testifying. Smirks, stares or chuckling could all be intimidating to a child witness, but no such conduct was engaged in here, and thus these extreme measures violated the due process clause. Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057 (1970).

CONCLUSION

For the reasons stated in the Argument above, the judgment of the Supreme Court of Iowa should be reversed and the cause be remanded to the trial court for a new trial.

Respectfully submitted,

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